Supreme Court, U.S.
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No. 02 155

In The

Supreme Court of the United States

RAYMOND GALLEGOS,

Petitioner,

v.

ANTHONY J. PRINCIPI,
SECRETARY OF VETERANS AFFAIRS,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Federal Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Federal Circuit correctly interpreted 38 U.S.C. § 7105?

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PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully petitions for a writ of *certiorari* to review this case decided below by the United States Court of Appeals for the Federal Circuit.

OPINIONS BELOW

The opinion of the Court of Appeals for the Federal Circuit is published as 283 F.3d 1309 (Fed. Cir. 2002) and reprinted in the Appendix ("App.") at App. 1.

STATEMENT OF JURISDICTION

The Court has jurisdiction to review this petition with respect to this case pursuant to 28 U.S.C. § 1254(1). The judgment of the Federal Circuit was entered on March 15, 2002.

PROVISIONS INVOLVED

38 U.S.C. § 7105. **Filing of notice of disagreement and appeal**

(a) Appellate review will be initiated by a notice of disagreement and completed by a substantive appeal after a statement of case is furnished as prescribed in this section. Each appellant will be accorded hearing and representation rights pursuant to the provisions of this chapter and regulations of the Secretary.

(b)(1) Except in the case of simultaneously contested claims, notice of disagreement shall be filed within one year from the date of mailing of notice of the result of initial review or determination. Such

notice, and appeals, must be in writing and be filed with the activity which entered the determination with which the disagreement is expressed (hereinafter referred to as the "agency of original jurisdiction"). A notice of disagreement postmarked before the expiration of the one-year period will be accepted as timely filed.

(b)(2) Notices of disagreement, and appeals, must be in writing and may be filed by the claimant, the claimant's legal guardian, or such accredited representative, attorney, or authorized agent as may be selected by the claimant or legal guardian. Not more than one recognized organization, attorney, or agent will be recognized at one time in the prosecution of a claim.

(c) If no notice of disagreement is filed in accordance with this chapter within the prescribed period, the action or determination shall become final and the claim will not thereafter be reopened or allowed, except as may otherwise be provided by regulations not inconsistent with this title.

(d)(1) Where the claimant, or the claimant's representative, within the time period specified in this chapter, files a notice of disagreement with the decision of the agency of original jurisdiction, such agency will take such development or review action as it deems proper under the provisions of the regulations not inconsistent with this title. If such action does not resolve the disagreement either by granting the benefit sought or through withdrawal of the notice of disagreement, such agency shall prepare a statement of case. A statement of case shall include the following:

(A) A summary of the evidence in the case pertinent to the issue or issues with which disagreement has been expressed.

(B) A citation to pertinent laws and regulations and a discussion of how such laws and regulations affect the agency's decision.

(C) The decision on each issue and a summary of the reasons for such decision.

(d)(2) A statement of case, as required by this subsection, will not disclose matters that would be contrary to section 5701 of this title or otherwise contrary to the public interest. Such matters may be disclosed to a designated representative unless the relationship between the claimant and the representative is such that disclosure to the representative would be as harmful as if made to the claimant.

(d)(3) Copies of the "statement of case" prescribed in paragraph (1) of this subsection will be submitted to the claimant and to the claimant's representative, if there is one. The claimant will be afforded a period of sixty days from the date the statement of case is mailed to file a formal claim. This may be extended for a reasonable period on request for good cause shown. The appeal should set out specific allegations of error of fact or law, such allegations related to specific items in the statement of case. The benefits sought on appeal must be clearly identified. The agency of original jurisdiction may close the case for failure to respond after the receipt of a statement of case, but questions of timeliness or adequacy of response shall be determined by the Board of Veterans' Appeals.

(d)(4) The claimant in any case may not be presumed to agree with any statement of fact contained in the

statement of case to which the claimant does not specifically express agreement.

(d)(5) The Board of Veterans' Appeals may dismiss any appeal which fails to allege specific error of fact or law in the determination being appealed.

38 C.F.R. § 20.201. **Rule 201. Notice of Disagreement.** A written communication from a claimant or his or her representative expressing dissatisfaction or disagreement with an adjudicative determination by the agency of original jurisdiction and desire to contest the result will constitute a Notice of Disagreement. While special wording is not required, the Notice of Disagreement must be in terms which can be reasonably construed as disagreement with that determination and a desire for appellate review. If the agency of original jurisdiction gave notice that adjudicative determinations were made on several issues at the same time, the specific determinations with which the claimant disagrees must be identified. For example, if service connection was denied for two disabilities and the claimant wishes to appeal the denial of service connection with respect to only one of the disabilities, the Notice of Disagreement must make that clear.

STATEMENT OF THE CASE

The Court of Appeals for Veterans Claims determined that 38 C.F.R. § 20.201 (1998) – a Department of Veterans Affairs (VA) regulation setting minimum requirements for a notice of disagreement (NOD) – was invalid because the regulation required that an NOD expressed a desire for review by the Board of Veterans' Appeals (Board).

Upon review by the United States Court of Appeals for the Federal Circuit on an appeal by the Department of

Veterans Affairs, the Federal Circuit held that "Because the Court of Appeals for Veterans Claims did not properly defer under *Chevron U.S.A., Inc. v. National Resources Def. Council, Inc.*, 467 U.S. 837, 844, 104 S.Ct. 2778, 2782, 81 L.Ed.2d 694 (1984), and because 38 C.F.R. § 20.201 is not procedurally defective, arbitrary or capricious in substance, or manifestly contrary to statute, the Federal Circuit reversed and remanded."

REASONS FOR GRANTING THE WRIT

The Notice of Disagreement (NOD) – the initial step, of a two step process to initiate an administrative appeal of a decision of the Department of Veterans Affairs – affects every claimant who is considering whether to appeal such a decision. As correctly described by the dissent below, the Federal Circuit's decision permits "the VA to rewrite Congress' clearly stated meaning for a NOD." As a result of the majority decision below, it is no longer enough for a claimant to merely tell the Agency of a disagreement with an Agency decision, to initiate the appeal process a claimant must now also add the "magic words" that "he desires appellate review." In a system intended to be veteran friendly, the Federal Circuit has, as a result of the misapplication of this Court's decision in *Chevron*, significantly impeded the ability of a claimant to obtain review of decisions of the Secretary.

As further recognized by the dissent in the opinion below, the Federal Circuit's decision in this matter cannot be reconciled with the plain meaning of the full text of 38 U.S.C. § 7105 "because there is no 'gap' in 38 U.S.C. § 7105 with respect to a notice of disagreement ('NOD')." Consequently, deference under *Chevron U.S.A., Inc. v. Natural*

Resource Defense Council, Inc., 467 U.S. 837, 81 L.Ed.2d 694, 104 S.Ct. 2778 (1984), is not applicable.

The Federal Circuit's decision in this matter regarding the necessary requirements for a Notice of Disagreement implicates not only the entitlement to administrative appellate review by the Board of Veterans' Appeals, but will also prevent a claimant from obtaining judicial review of Agency decision making by the United States Court of Appeals for Veterans Claims.

The Secretary's interpretation of 38 U.S.C. § 7105, in 38 C.F.R. 20.201 is manifestly contrary to the statute. The statutory scheme created by Congress for obtaining administrative appellate review **requires** a two-step notice of intent to appeal a decision of the Secretary of the Department of Veterans Affairs. *See* 38 U.S.C. § 7105(a). Appellate review is **initiated** by a notice of disagreement, but is not **completed** until an appellant files a **substantive appeal** after the issuance of a statement of case. The Agency's promulgation of 38 C.F.R. § 20.201 is manifestly contrary to the plain meaning of 38 U.S.C. § 7105 in its imposition of an unreasonable and unnecessary burden upon an appellant to express a desire for appellate review by the Board of Veterans' Appeals.

The majority's reliance on *Chevron* is misplaced. The Federal Circuit failed to correctly apply the step one analysis of *Chevron*. The plain language and overall structure of 38 U.S.C. § 7105 does not support the Agency's imposition of an additional requirement to a Notice of Disagreement, and as a consequence the Federal Circuit should have stopped at step one of the *Chevron* analysis. *See Skinner v. Brown*, 27 F.3d 1571, 1572 (Fed.Cir. 1994) ("If the intent of Congress is clear, that is the end of the

matter.") (quoting *Chevron* at 842). *See also Brown v. Gardner*, 115 S.Ct. 552 (1996).

Nothing in the plain language of 38 U.S.C. § 7105 requires, suggests, or infers that a notice of disagreement include the expression of, "a desire for appellate review," as imposed by 38 C.F.R. § 20.201. To the contrary, the plain language of the statute **only** requires that a notice of disagreement, "must be in writing and be filed with the activity which entered the determination with which disagreement is expressed (hereinafter referred to as the "agency of original jurisdiction")." *See* 38 U.S.C. § 7105(b)(1). The statute **requires only** that a notice of disagreement **express disagreement** with the determination made by the Agency of Original Jurisdiction. It does not say, and cannot be read to say, that an appellant must also express, "a desire for appellate review."

Under a prior version of the regulation to be a valid notice of disagreement there must be a "written communication from a claimant or his or her representative expressing dissatisfaction or disagreement with an adjudicative determination by the agency of original jurisdiction and a desire to contest the result." 38 C.F.R. § 20.201 (1992). *See Cates v. Brown*, 5 Vet.App. 399, 400 (1993). Prior to 1992 there was no Rule 201. *See* Chapter 38 of the Code of Federal Regulations for 1991. The current version of § 20.201 recognizes that "special wording" is not required for a notice of disagreement, but it must be in terms which "can be reasonably construed as disagreement." The statute **requires** nothing more than an appellant to **initiate** an appeal by expressing disagreement with an Agency decision.

The Federal Circuit's decision below fails to consider the provisions of 38 U.S.C. § 7105(d) in its analysis of the requirements for the necessary content of a notice of disagreement. 38 U.S.C. § 7105(d)(1) states that once a claimant has filed a notice of disagreement with the agency of original jurisdiction that the Agency "will take such development or review action as it deems proper." Clearly, the expression of a "desire for appellate review," is **not necessary** for the Agency to proceed with the issuance of a statement of case under § 7105(d)(1). The statute continues that if the action contemplated by the statute to be taken by the Agency following the receipt of a notice of disagreement, "does not resolve the disagreement either by granting the benefit sought or through withdrawal of the notice of disagreement, such Agency **shall prepare** a statement of case."

Thus, the issuance of a statement of case is **mandatory** based upon the receipt of a notice of disagreement. There is no reason to infer that a statement of case should not be provided **absent** the expression of a desire for appellate review. To the contrary, the statute imposes upon the Agency the affirmative duty, following receipt of a notice of disagreement, to attempt to resolve the disagreement, without appellate review. It is clear, therefore, that Congress **only** asked that appellants express **disagreement** in order to be entitled to the issuance of a statement of case.

It is critically important to understand that a claimant **does not** always, or even frequently, receive a copy of the ratings decision or agency action with which disagreement is being filed. More often, the claimant receives a single page correspondence which states succinctly that the benefit sought has been denied, without further

explanation, as to the evidence, the law or the reasons for denial. It is evident that Congress understood this to be the case because of the text of 38 U.S.C. §§ 7105(d)(1)(A), (B), and (C). In subparagraphs (A), (B), and (C), Congress **requires** that a statement of case include, a summary of the evidence pertinent to the issue or issues with which disagreement has been expressed; citation to pertinent laws and regulation **and** a discussion of how such laws and regulations affected the Agency's decision; and a description of the decision on each issue and a summary **of the reasons** for such decisions.

As a consequence, more often than not, claimants have been previously **informed** of the evidence, law relied upon to make the decision to deny the benefit sought, or having **ever** received an explanation of the reasons for that decision **until** a statement of case is issued. It should be apparent, therefore, that a claimant need only express **disagreement** with a decision made in a notice of disagreement, in order to receive a statement of case. It is in the statement of case that the Agency **explains** for the first time the evidentiary and legal basis upon which the denial was made and a summary of the reasons for the Agency's decision.

A review of 38 U.S.C. § 7105(d)(3), which was not made by the Federal Circuit, reveals that a claimant is afforded a period of sixty days from the date that the statement of case is mailed to file the **formal appeal**. Obviously, what is referred to as the **substantive appeal** in § 7105(a) is when an appellant is required to **formally**, "express a desire for appellate review," as opposed to within the text of a notice of disagreement. This reading of the statutory scheme is further supported by the language of § 7105(d)(3) which states, "The appeal should set out

specific allegations of error of fact or law, such allegations related to the **specific items** in the statement of case." (Emphasis added) The statute goes on to indicate that, "The benefits sought on appeal **must be** clearly identified." (Emphasis added)

38 U.S.C. § 7105(d)(4) further supports the Petitioner's reading of the statutory scheme when it states that, "The claimant in any case **may not be presumed to agree** with any statement of fact contained in the statement of case to which the claimant does not specifically express agreement." (Emphasis added) The effect of the Agency's regulation, 38 C.F.R. § 20.201, is to **prevent** the issuance of a statement of case based upon an appellant's **failure** to "express a desire for appellate review." Yet, it is not **until** a claimant files a notice of disagreement that a claimant is entitled to the issuance of a statement of case. It is not until a claimant receives a statement of case that a claimant is told the evidence, the law, and the reasoning of the Agency in denying a claim. It is, therefore, **patently unreasonable** and **manifestly contrary** to the statute to impose upon an appellant a requirement to express a "desire for appellate review," **before** an appellant has received a statement of case.

Finally, in 38 U.S.C. § 7105(d)(5), the Board of Veterans' Appeals is given express authority by Congress to "dismiss any appeal which **fails** to allege specific error of fact and law in the determination being appealed." (Emphasis added) With this statutory requirement **imposed by Congress** upon an appellant to complete an appeal by a **substantive appeal** negates any justification imagined by the Agency to be necessary in a notice of disagreement that an appellant "express a desire for appellate review." Congress **clearly**, by the content of 38 U.S.C.

§§ 7105(d)(3), (4) and (5), mandated the imposition upon an appellant to allege **specific error of law and fact** in order to complete an appeal by the filing of a **substantive appeal**.

The Secretary has interpreted 38 U.S.C. § 7105(d)(3) by regulation at 38 C.F.R. § 20.203. The Secretary requires:

> A decision as to the adequacy of allegations of error of fact or law in a **Substantive Appeal** will be made by the Board of Veterans' Appeals. When the Board raises the issue of the adequacy of the **Substantive Appeal**, the appellant and the representative, if any, **will be given notice** of the issue **and** a period of 60 days following the date on which such notice is mailed to present written argument or request a hearing to present oral argument on this question. (Emphasis added)

In light of the statutory requirements imposed upon an appellant by statute to make **specific** allegations of error of fact or law in a **Substantive Appeal**, the Agency cannot be justified in creating the additional requirement upon an appellant to express, "a desire for appellate review," in a notice of disagreement. A notice of disagreement **initiates** the appellate process. By **initiating** the appellate process, an appellant receives a statement of case and is required to perfect an appeal with the filing of a **Substantive Appeal** which by statute requires that an appellant, "set out specific allegations of error of fact or law." As a consequence, the requirement imposed in 38 C.F.R. § 20.201 is **unreasonable and manifestly** contrary to the statute.

There is no "gap" to be found within the plain meaning of 38 U.S.C. § 7105 with respect to the content contemplated by Congress to be included within a notice of disagreement (NOD), to **initiate** the appellate process, which requires an expression by an appellant of "a desire for appellate review." *See* 38 U.S.C. § 7105(a). The Federal Circuit's perception of such a "gap" is not supported by the plain meaning of the full text of 38 U.S.C. § 7105. 38 C.F.R. § 20.201 impermissibly creates a prerequisite for a notice of disagreement, which **does not** exist in the statute.

The Secretary's regulation is, therefore, not entitled to *Chevron* deference. The regulatory requirement that the NOD must "express a desire for appellate review" as established by the VA's regulation, 38 C.F.R. § 20.201, cannot be upheld, as correctly noted by the dissent. *Gallegos v. Principi*, 283 F.3d 1309, 1315 (Fed.Cir. 2002). The unambiguous description of the content of a "notice of disagreement" in the statute does not allow for the imposition of an additional procedural requirement. The Secretary's regulation impermissibly expands the requirements for a valid notice of disagreement by requiring that appellants also express a desire for appellate review. The plain meaning of the content required for a valid notice of disagreement is not only clear, but obvious. *Gallegos* dissent at 1315. The Department of Veterans Affairs by regulation improperly added a "technical, formal requirement" to the mandatory content of a notice of disagreement to **initiate** an appeal.

If the statutory language is clear and unambiguous on its face, then there can be no gap, and *Chevron* deference **is not** to be afforded by the reviewing Court. *See Dole v. United Steelworkers of America*, 494 U.S. 26, 42-43, 110

S.Ct. 929, 938 (1990); *Chevron*, 467 U.S. at 842 ("If the intent of Congress is clear, that is the end of the matter"); *Id.* at 843 n. 9 ("If a court, employing traditional tools of statutory construction, ascertains that Congress had an intention on the precise question at issue, that intention is the law and must be given effect.")

The effect of the Agency's regulation, and the Federal Circuit's opinion which concludes that a gap exists, is the creation of a **barrier** to appellate review, where **none** is contemplated by the text of 38 U.S.C. § 7105.

CONCLUSION

The Federal Circuit's decision in this matter cannot be reconciled with the plain meaning of the full text of 38 U.S.C. § 7105. The Federal Circuit's decision below relies upon the creation of a "gap," where no "gap" exists. There is no basis for the Agency's interpretation of 38 U.S.C. § 7105 or the Federal Circuit's erroneous reliance upon *Chevron*. 38 C.F.R. § 20.201 creates an **unreasonable and unnecessary** barrier to appellate review where the expression of a "desire for appellate review," cannot be justified.

Allowing the Federal Circuit's decision to stand is inconsistent with this Court's decision in *Chevron*, which was incorrectly applied by the Federal Circuit. The content of a notice of disagreement is clearly and unambiguously expressed in 38 U.S.C. § 7105(b)(1). An appellant should not be required to communicate anything more to the Agency in order to **initiate** an appeal, other than, "I disagree with your decision."

For the foregoing reasons, the writ of *certiorari* should be granted.

Respectfully submitted,

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United States Court of Appeals
For the Federal Circuit

01-7037

RAYMOND GALLEGOS,

Claimant-Appellant,

v.

ANTHONY J. PRINCIPI,
Secretary of Veterans Affairs,

Respondent-Appellee.

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Appealed from: United States Court of Appeals for Veterans Claims

Judge Jonathan R. Steinberg

United States Court of Appeals
For the Federal Circuit

01-7037

RAYMOND GALLEGOS,

Claimant-Appellee,

v.

ANTHONY J. PRINCIPI, Secretary of Veterans Affairs,

Respondent-Appellant.

DECIDED: March 15, 2002

Before LOURIE, RADER, and GAJARSA, Circuit Judges.

Opinion for the court filed by *Circuit Judge* RADER. Dissenting opinion filed by *Circuit Judge* GAJARSA.

RADER, *Circuit Judge*.

The Court of Appeals for Veterans Claims determined that 38 C.F.R. § 20.201 (1998) – a Department of Veterans Affairs (VA) regulation setting minimum requirements for a notice of disagreement (NOD) – was invalid because the regulation required that an NOD express a desire for review by the Board of Veterans' Appeals (Board). After invalidating the regulation, the Court of Appeals for Veterans Claims held that a letter submitted by Raymond Gallegos's authorized representative to a regional office was a valid NOD even without any expression of a desire for review by the Board. Because the Court of Appeals for Veterans Claims did not properly defer under *Chevron U.S.A., Inc. v. Natural Resources Def. Council, Inc.*, 467

U.S. 837, 844, 104 S. Ct. 2778, 2782 (1984), and because 38 C.F.R. § 20.201 is not procedurally defective, arbitrary or capricious in substance, or manifestly contrary to statute, this court reverses and remands.

I.

In March 1992, Raymond Gallegos applied for service connection for disability due to diabetes and chloracne (acne-like eruptions on the face, linked to dioxin exposure). In August 1993, Mr. Gallegos amended his claim to include a claim for service connection for Post Traumatic Stress Disorder (PTSD). In September 1994, the regional office (RO) denied his PTSD claim. Mr. Gallegos's representative, the Disabled American Veterans (DAV), submitted a letter entitled "Memo to Rating Board" to the VA on October 11, 1994. This 1994 DAV letter stated: "[I]t is our opinion that denial of the veteran's claim for [PTSD] was a little bit premature. Further development [i.e., a review of other documents] . . . would prove beneficial to fair evaluation of this veteran's claim." The record does not indicate what action the VA took in response to that letter.

Mr. Gallegos took no further action on his claim until February 20, 1997, when he filed an application to reopen his disallowed claim for service connection for PTSD. In October 1997, the RO granted that claim effective February 20, 1997, the date of Mr. Gallegos' application to reopen the claim. Soon after, Mr. Gallegos filed an NOD disagreeing with the 1997 effective date. In that NOD, Mr. Gallegos sought an effective date of August 31, 1993, the date on which he first claimed service connection for PTSD.

In December 1998, the Board held that Mr. Gallegos was not entitled to the earlier effective date. *In re Gallegos,* C 25 623 426, slip op. at 9 (Dec. 9, 1998). Applying 38 C.F.R. § 20.201, the Board reasoned that the 1994 DAV letter – although perhaps questioning the RO's denial of PTSD – did not "indicate the appellant's desire for appellate review." *Id.* at 8. Thus, the Board concluded that the 1994 DAV letter did not constitute a valid NOD appealing the September 1994 denial of the original PTSD claim. Because Mr. Gallegos did not submit a valid NOD in 1994, the Board made the September 1994 decision final. As a consequence, the Board sustained the effective date of February 20, 1997 for Mr. Gallegos' PTSD benefits.

The Court of Appeals for Veterans Claims reversed the Board's decision. Specifically, the Court of Appeals for Veterans Claims determined that 38 U.S.C. § 7105, the statutory NOD requirement, needed no interpretation or implementation by regulation. *Gallegos v. Gober,* 14 Vet. App. 50, 56 (2000). Thus, the Court of Appeals for Veterans Claims declined to apply *Chevron* deference to the VA's regulatory implementation of the statute, namely 38 C.F.R. § 20.201. Relying on the language of § 7105, the prior decision of *Tomlin v. Brown,* 5 Vet. App. 355 (1993), and the pro-claimant nature of the veteran adjudication system, the veterans court struck from § 20.201 the requirement that an NOD express "a desire for appellate review." The Secretary of Veterans Affairs now appeals.

II.

When reviewing an agency's construction of a statute that it administers, this court first determines "whether Congress has directly spoken to the precise question at

issue." *Chevron,* 467 U.S. at 842. If the law governs the question under consideration, this court and the agency "must give effect to the unambiguously expressed intent of Congress." *Id.* at 843. If, however, the law does not speak to the issue, this court then asks whether the administering agency properly promulgated an interpretative regulation "based on a permissible construction of the statute." *Id.; Micron Tech., Inc. v. United States,* 243 F.3d 1301, 1308 (Fed. Cir. 2001).

In other words, this court defers to the VA's reasonable interpretation of a statutory provision when the law does not directly address the precise question at issue, in other words, when the law leaves "a gap for an agency to fill." *Chevron,* 467 U.S. at 843 ("The power of an administrative agency to administer a congressionally created . . . program necessarily requires the formulation of policy and the making of rules *to fill any gap left, implicitly or explicitly, by Congress.*" (quoting *Morton v. Ruiz,* 415 U.S. 199, 231, 94 S. Ct. 1055, 1072 (1974)) (emphasis added)); *see also Immigration & Naturalization Serv. v. Aguirre-Aguirre,* 526 U.S. 415, 424, 119 S. Ct. 1439, 1445 (1999). The Supreme Court chose to emphasize that *Chevron* deference applies unless the statute speaks "directly" "to the precise question." Under *Chevron* deference, "any ensuing [agency] regulation is binding in the Courts unless procedurally defective, arbitrary or capricious in substance, or manifestly contrary to the statute." *United States v. Mead Corp.,* 533 U.S. 218, ___, 121 S. Ct. 2164, 2171 (2001).

III.

Under 38 U.S.C. § 501, "[t]he Secretary has authority to prescribe all rules and regulations which are *necessary or appropriate* to carry out the laws administered by the Department and are consistent with those laws." 38 U.S.C. § 501 (1994) (emphasis added). The Secretary of Veterans Affairs asserts that the VA properly interpreted and implemented 38 U.S.C. § 7105 by promulgating 38 C.F.R. § 20.201. Specifically, the Secretary notes that title 38 does not define a "notice of disagreement." The Secretary's regulation seeks to define that undefined statutory term. In other words, the Secretary seeks to fill a gap in the statute.

Section 7105(a) states that: "Appellate review will be initiated by a notice of disagreement and completed by a substantive appeal. . . . " Section 7105(b) further states, in relevant part:

> (1) [A] notice of disagreement *shall be filed within one year* from the date of mailing of notice of the result of initial review or determination. Such notice, and appeals, *must be in writing* and *be filed with the activity which entered the determination with which disagreement is expressed*. . . .
>
> (2) Notices of disagreement, and appeals, *must be in writing and may be filed by the claimant, the claimant's legal guardian, or such accredited representative, attorney, or authorized agent* as may be selected by the claimant or legal guardian.

38 U.S.C. § 7105(b)(1)-(2) (1994) (emphasis added).

This statutory language supplies some requirements for a valid NOD. For instance, title 38 requires a written NOD. In addition, the claimant or his representative must file this writing with the "activity which entered the determination with which disagreement is expressed" – the regional office in this case – within one year of notice of an initial determination. The statute does not, however, define "notice of disagreement" or suggest sufficient expressions to make a writing an NOD. The statute also does not suggest that its specifications for an NOD – writing, one-year time limit from notice, etc. – are the only requirements for a valid NOD. In sum, § 7105 does not address directly the precise question under review. In a general sense, the statute does not define an NOD. More important, on the *precise* question under review, the statute does not *directly* address whether an NOD is sufficient without a request for appellate review. Therefore, under the standard set by the Supreme Court, title 38 contains "a gap for an agency to fill" with regard to the definition of a legally valid NOD. *Chevron,* 467 U.S. at 843.

Indeed, the Veterans Department had supplied a regulatory definition of the term "notice of disagreement" as early as 1963. In that earlier regulatory definition, the former 38 C.F.R. § 19.1a(b), an NOD "should be in terms which can be reasonably construed as evidencing a desire for review of [the VA's] determination." Later enactments did not disturb these earlier regulatory definitions of NOD.

Thus, § 7105 does not express a complete and unambiguous meaning for the statutory term "notice of disagreement." Moreover, the statute does not directly address the sufficiency of an NOD without a request for

appellate review – the precise question posed by this case. In sum, *Chevron* deference applies to the VA's implementation of § 7105, i.e., 38 C.F.R. § 20.201.

The VA promulgated § 20.201 in 1992 to expressly define a "notice of disagreement" in § 7105. As stated in § 20.201:

> A written communication from a claimant or his or her representative expressing dissatisfaction or disagreement with an adjudicative determination by the agency of original jurisdiction and a desire to contest the result will constitute a Notice of Disagreement. While special wording is not required, the Notice of Disagreement must be in terms that can be reasonably construed as disagreement with that determination and a desire for appellate review.

Thus, under § 20.201, a valid NOD must contain "terms that can be reasonably construed as disagreement with that determination and a desire for appellate review."

Section 20.201 is a reasonable and permissible construction of § 7105. Section 7105 does not preclude other requirements for an NOD. Moreover, § 20.201 merely states that a veteran NOD must include terms that can be reasonably construed as a desire for appellate review. This requirement serves administrative efficiency by distinguishing a request for Board review from other routine communications in the wake of a VA decision. Assuming the veteran desires appellate review, meeting the requirement of § 20.201 is not an onerous task.

Section 7105(d) specifies that the regional office must file a "statement of the case" if the matter remains unresolved after an NOD. 38 U.S.C. § 7105(d)(1) (1994). Mr.

Gallegos contends that a veteran cannot make an informed decision to appeal without the information in the statement of the case, which the veteran receives only after filing an NOD. To the contrary, the VA decision itself provides the veteran with information for an informed appeal decision. As required under 38 U.S.C. § 5104(b), notice of a VA decision must include a statement of reasons for the decision and a summary of the evidence considered by the VA. 38 U.S.C. § 5104(b) (1994); *see also Hayre v. West,* 188 F.3d 1327, 1334 n.4 (Fed. Cir. 1999). Such notice, which a veteran receives before the NOD filing deadline, *see* § 7105(b)(1), provides the veteran with enough information to support an NOD – namely a letter "reasonably construed as disagreement with . . . a desire for appellate review." Even if still harboring questions, a veteran can easily include his intent to appeal in a letter of disagreement to preserve an appeal option.

Although "initiating" the appeal process, an NOD may or may not actually lead to an appellate review. After receiving the NOD, the regional office reviews the claim again. If the regional office can resolve the disagreement at that point, no appeal ensues. If the regional office cannot resolve the disagreement, it proceeds to prepare a "statement of the case." 38 U.S.C. § 7105(d)(1). The veteran then receives "sixty days from the date the statement of the case is mailed to file the formal appeal." 38 U.S.C. § 7105(d)(3).

In any event, § 20.201 is not procedurally defective, arbitrary or capricious in substance, or manifestly contrary to § 7105 or any other relevant statute. In reaching this conclusion, this court has considered as well the pro-claimant nature of the veteran adjudication system. This court has already decided that *Chevron* deference may

apply in the pro-claimant context of title 38. *See Gilpin v. West,* 155 F.3d 1353, 1356, n.2 (Fed. Cir. 1998), *cert. denied,* 526 U.S. 1144 (1999) ("It is beyond question that the Secretary has substantive rule-making power with respect to the benefits in question here and thus *Chevron* deference applies.").

CONCLUSION

In sum, the Court of Appeals for Veterans Claims erred in not applying *Chevron* deference to the VA's implementation of 38 U.S.C. § 7105, i.e., 38 C.F.R. § 20.201. The Court of Appeals for Veterans Claims also erred when it invalidated § 20.201 with regard to the requirement that an NOD contain "terms that can be reasonably construed as . . . a desire for appellate review." This court, therefore, reverses and remands the decision of the Court of Appeals for Veterans Claims for a determination of whether Mr. Gallegos's 1994 DAV letter constitutes a valid NOD under § 20.201.

COSTS

Each party shall bear its own costs.

REVERSED and REMANDED.

United States Court of Appeals
for the Federal Circuit

01-7037

RAYMOND GALLEGOS,

Claimant-Appellee,

v.

ANTHONY J. PRINCIPI,
Secretary of Veterans Affairs,

Respondent-Appellant.

GAJARSA, *Circuit Judge*, dissenting.

This court should affirm the Court of Appeals for Veterans Claims in *Gallegos v. Gober,* 15 Vet.App. 50 (2000) ("*Gallegos*"), because there is no "gap" in 38 U.S.C. § 7105 with respect to a notice of disagreement ("NOD"). By applying deference under *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.,* 467 U.S. 837 (1984), through its prismatic view of a "gap" in a clear statute, the majority upholds a Veterans Administration's ("VA") regulation that rewrites Congress' clearly stated meaning for a NOD. The majority establishes an illusory "gap" by positing questions that the statute clearly answers, and then asserting that these supposedly unanswered questions justify the VA's regulation: "whether a[ ] NOD is sufficient without a request for appellate review,"

and whether the statute "define[s] a 'notice of disagreement'." Maj. Op. at 4-5.[1]

I believe, however, that the plain meaning and structure of § 7105 leave no room for an agency to add additional requirements to a NOD: the inquiry does not pass step one of the *Chevron* test.[2] Without *Chevron* deference, the regulatory requirement that the NOD must "express a desire for appellate review" as established by the VA's regulation, 38 C.F.R. § 20.201, cannot be upheld. Further, relevant precedent and policy dictate that the holding of the Court of Appeals for Veterans Claims should be affirmed. Therefore, I respectfully dissent.

The plain meaning of the term "notice of disagreement" does not allow for the addition of procedural requirements, such as expanding the NOD definition to require that claimants also express a desire for appellate review, in order for their NOD to be valid. The plain meaning is not only clear, but obvious. The term "notice" denotes "giv[ing] legal notice to or of . . . [t]o realize or give attention to." *Black's Law Dictionary* 1088 (7th ed. 1999). The term "disagreement" specifies the type of notice required in a NOD: "[a] difference of opinion; a lack of agreement." *Id.* at 475.

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[1] The majority additionally contends that § 7105 does not "suggest sufficient expressions to make a writing a NOD" and does not suggest that its specifications for a NOD are the only requirements. Maj. Op. at 5. With this statement, however, the majority admits that § 7105 specifies many aspects of a NOD: "writing, one-year time limit from notice, *etc.*" *Id.* (emphasis added).

[2] *See Skinner v. Brown*, 27 F.3d 1571, 1572 (Fed. Cir. 1994) ("If the intent of Congress is clear, that is the end of the matter.") (quoting *Chevron* at 842).

Thus, by plain meaning, "notice of disagreement" means giving attention to a lack of agreement. In the context of § 7105, this meaning applies to the veteran's claim. The claimant advises the VA of his or her lack of agreement with the initial review or determination for the claim by filing a NOD. 38 U.S.C. § 7501(b)(1) (1994). There is no ambiguity in the well-known concepts of "notice" and "disagreement." These concepts and the plain meaning of these terms do not cover "expressing a desire for appellate review" as called for by the regulation. 38 C.F.R. § 20.201 (2001).

The Court of Appeals for Veterans Claims found, and the majority does not contest, that the letter sent on Mr. Gallegos behalf by the DAV expresses notice of disagreement, *i.e.*, gives attention to a lack of agreement, with the initial decision on Mr. Gallegos' PTSD claim. *Gallegos* at 58. Thus, but for the additional regulatory procedural requirement erroneously added by the VA, the DAV's actions on Mr. Gallegos behalf would have entitled him to the earlier effective date for his claim. The alleged "gap" in § 7105 does not support stripping Mr. Gallegos of his right to the earlier date when the VA improperly added a "technical, formal requirement" for a NOD. *Gallegos* at 57 (citing *Tomlin v. Brown,* 5 Vet. App. 355, 357 (1993)).[3] Because the statute is clear and there is no gap, *Chevron*

[3] As put by the Court of Appeals for Veterans Claims: "we conclude that there is no "gap" in this statutory scheme and that the Secretary, rather than having filled in the gap conjured up by the dissenting opinion, has by regulation raised a barrier to appellate review where none exists in section 7105." *Gallegos* at 56.

deference does not apply. [4] The Supreme Court has itself noted that when the statute is clear *Chevron* deference does not apply. *See Dole v. United Steelworkers of America,* 494 U.S. 26, 42-43, 110 S.Ct. 929, 938 (1990); *Chevron,* 467 U.S. at 842 ("If the intent of Congress is clear, that is the end of the matter"); *id.* at 843 n.9 ("If a court, employing traditional tools of statutory construction, ascertains that Congress had an intention on the precise question at issue, that intention is the law and must be given effect.").

We have more, however, than the plain meaning of "notice of disagreement" to inform the term NOD. In various subsections of § 7105, Congress has given several clear statements concerning the role of a NOD in the process Congress specified whereby a claimant initiates appellate review. Tellingly, the majority does not discuss these portions of § 7105. These provisions describe a multi-step process Congress set forth to initiate appellate review. They delineate the difference between a NOD, the first step, and the later steps, which may eventually lead to a request for review. Further, the majority opinion fails to address Mr. Gallegos' arguments concerning the import of the multi-step process on the meaning of NOD. In the context of this multi-step process, clearly articulated by § 7105, a NOD cannot be expected or interpreted to express a desire for appellate review. The Court of Appeals

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[4] This court has previously reviewed § 7105 and the term "notice of disagreement" in light of a related but instructive question – whether for jurisdictional purposes § 7105 allows for more than one NOD in a single claim. *Hamilton v. Brown,* 39 F.3d 1574, 1574 (Fed. Cir. 1994). In this review, we explicitly found that there was no gap in meaning for a NOD in § 7105 with respect to this question, and therefore, *Chevron* deference did not apply. *Id.* at 1585.

for Veterans Claims recognized this and applied structural statutory interpretation to reach the correct result – that the VA cannot add an additional procedural requirement to the NOD.

The relevant sections of § 7105 are set forth below in greater detail to illustrate the provisions ignored by the majority.

> § 7105. Filing of *notice of disagreement* ***and*** appeal
>
> (a) ***Appellate review will be initiated*** by a *notice of disagreement* and ***completed by a substantive appeal after a statement of the case is furnished*** as prescribed in this section. . . . .
>
> (b) (1) Except in the case of simultaneously contested claims, *notice of disagreement* shall be filed within one year from the date of mailing of notice of the result of initial review or determination. . . . .
>
> (2) *Notices of disagreement, and* ***appeals,*** must be in writing . . . .
>
> (c) . . . .
>
> (d) (1) Where the claimant, or the claimant's representative, within the time specified in this chapter, files a *notice of disagreement* with the decision of the agency of original jurisdiction, such agency will take such development or review action as it deems proper under the provisions of regulations not inconsistent with this title. ***If such action does not resolve the disagreement either by granting the benefit sought or through withdrawal of the notice***

of disagreement, such agency shall prepare a statement of the case. . . . .

(2) . . . .

(3) Copies of the "statement of the case" prescribed in paragraph (1) of this subsection will be submitted to the claimant and to the claimant's representative, if there is one. The claimant will be afforded a period of sixty days from the date the statement of the case is mailed ***to file the formal appeal.*** This may be extended for a reasonable period on request for good cause shown. The ***appeal should set out specific allegations of error of fact or law, such allegations related to specific items in the statement of the case.*** . . . .

38 U.S.C. § 7105 (1994) (emphases and underlining added).

From the claimant's perspective, § 7105 sets forth the following steps for initiating an appeal: (i) within one year from the denial of the claim, file a NOD; (ii) receive a statement of the case; (iii) within sixty days from the date of the statement of the case, file a formal appeal. Our case law recognizes this structure.[5] The structure of this

[5] For example:

"The filing of a NOD triggers a reexamination of the claim at the AOJ. . . . . If disagreement persists, the appellate machinery moves forward, with the AOJ assisting the veteran in preparing a Statement of the Case (SOC) to present to the Board. The SOC contains a summary of the evidence and factual issues, a statement of the applicable statutes and regulations, and a discussion of their application to the

(Continued on following page)

sequence clearly relegates the function of requesting or expressing a desire for appellate review to the last step. The majority provides no viable reason why the VA's regulation should be allowed to trample on this clear procedural sequence described by Congress. It is true, as the majority describes, that 38 U.S.C. § 501 authorizes the VA to prescribe rules and regulations necessary or appropriate to carry out the laws administered by the VA. 38 U.S.C. § 501 (1994); Maj. Op. at 4. However, such regulations must be "consistent with those laws." § 501. Given the various clear indications in § 7105 that Congress envisioned a multi-step process, with expression of desire for appellate review being the last step and filing a NOD being the first, the VA's regulation is not "consistent" with § 7105. The VA's regulation merges the first and last step, contrary to the sequence prescribed, and making the statement of the case superfluous. In essence, the VA's regulation violates both § 7105 and § 501 because Congress' intent is clear and no *Chevron* deference should be afforded the regulation.[6]

facts. The SOC also sets out the AOJ's determinations on each of the issues that were determined adversely to the veteran. The veteran then selects the issues upon which he seeks to appeal to the Board, and specifies arguments relating to errors of fact or law made by the AOJ in reaching the determination being appealed."

Smith v. Brown, 35 F.3d 1516, 1520 (Fed. Cir. 1994). *See also Hamilton*, 39 F.3d at 1575-76 ("An administrative appeal proceeds through an elaborate set of steps before ending up in the Board of Veterans' Appeals.").

[6] As stated by the Court of Appeals for Veterans Claims:

All that a NOD-filing claimant need desire is review and development by the RO followed by its issuance of an SOC

(Continued on following page)

In particular, the use of the word "and" in the title of § 7105 recognizes that a NOD and an appeal are different steps. If Congress intended the NOD to specify a desire for appellate review, the title would be "Filing of notice of disagreement ***for*** appellate review." Similarly, § 7105(a) spells out the multi-step process. The NOD merely initiates the process, and a substantive appeal completes the process "after a statement of the case is furnished" to the claimant. 38 U.S.C. § 7105(a) (1994). Next, § 7105(b)(2) underscores the difference between a NOD and an appeal. § 7105(b)(2). Further, § 7105(d)(1) recognizes that the process may stop after the claimant files the NOD: "if such action does not resolve the disagreement either by granting the benefit sought or withdrawal of the [NOD], [the agency] shall prepare a statement of the case." § 7105(d)(1). Another portion of that subsection then specifies that within sixty days from the date of the

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(or SSOC) if the claimant's disagreement is not resolved by the RO. This is the process required by section 7105(d)(1). Ultimately, if the claimant is still dissatisfied after receiving the SOC (or SSOC), he or she then may pursue an appeal to the BVA by filing a Substantive Appeal, and only then does the case go forward to the Board for its review. In other words, after a NOD is filed, it is quite possible that it may not become necessary to transmit the case to the BVA.

How then can it be reasonable for the Secretary to require that every denied VA claimant must, at the time he or she files a NOD, express a desire for BVA review? The answer is quite simply that it cannot be reasonable and that, accordingly, such a regulatory requirement would not be "consistent with" the statutory provisions, as it must be in order to be a valid regulatory requirement promulgated under 38 U.S.C. § 501(a).

Gallegos at 56.

statement of the case the claimant must file the formal appeal, and that the appeal is based on the statement of the case. § 7105(d)(3)

I fail to see how Congress could have specified this multi-step micro procedure for initiating an appeal and have not specified the meaning of a NOD within the process. It is clear within the procedure described that the NOD does not express the desire for appellate review because that is the purpose of filing the appeal, a separate step as clearly contemplated by § 7105. The majority mischaracterizes the holding of the Court of Appeals for Veterans Claims, which did not hold that the statutory NOD requirement "needed no interpretation or implementation by" the VA, Maj. Op. at 3, but rather held that Congress' intent was clear and there was no gap in § 7105 with respect to the meaning and specification of a NOD, *Gallegos* at 56. The Court of Appeals for Veterans Claims also, correctly in my view, noted that the relevant legislative history supported its interpretation of the term "notice of disagreement."[7] *Gallegos* at 58. In addition, applying its

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[7] The government argues that the legislative history associated with the Veteran's Judicial Review Act (VJRA), Pub. L. No. 100-687, 102 Stat. 4105, 4113-4121 (1988) (codified as amended at 38 U.S.C. § 7251 (1988)), supports the opposite contention realizable from the plain meaning and structure of § 7105: that Congress understood that a NOD expressed an intention to appeal. H.R. Rep. No. 100-963, pt. 1 at 14 (1988). *See also Hamilton,* 39 F.3d at 1576, 1582-84. This contention does not hold water, however, in light of our holdings in *Hamilton.* First, we noted that "the notion that an expansive Agency definition of a NOD was incorporated into § 402 of VJRA is inconsistent with the plain language of the statute and its legislative history." *Id.* at 1583-84. Further, we explicitly held that the VA's regulatory definition, which at that time contained the overreaching "desire for appellate review"

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own precedent in *Tomlin,* it expressed what is also in my view the correct, statutorily-authorized requirements for a NOD.[8]

The majority contends, on the one hand, that it considered the "pro-claimant nature of the veteran adjudication system," while on the other, upheld a requirement that "serves administrative efficiency." Maj. Op. at 7-8. While undoubtedly both policies are important, the majority's holding unnecessarily elevates the latter over the former. This is squarely against our precedent, which has consistently emphasized the Congressionally-mandated

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requirement, was not incorporated into the meaning of the statute by the VJRA. *Id.* at 1584.

[8] As put by the Court of Appeals for Veterans Claims:

> the statute provides clearly on its face that appellate review is initiated by a "notice of disagreement". The statute specifies the five elements for such a[ ] NOD: That it must (1) express disagreement with a specific determination of the agency of original jurisdiction (generally a decision by an RO [hereinafter referred to as "RO decision"]) (§ 7105(d)(2)); (2) be filed in writing (§ 7105(b)(1), (b)(2)); (3) be filed with the RO (§ 7105(b)(1)); (4) be filed within one year after the date of mailing of notice of the RO decision (§ 7105(b)(1)); and (5) be filed by the claimant or the claimant's authorized representative (§ 7105(b)(2)). The only content requirement is an expression of "disagreement" with the decision of the RO.

Gallegos at 54. The court further states that in *Tomlin* it noted the "clarity and completeness of the statute," which, by implication, "read out of the regulation any added requirement of an expression of a desire for appellate review." *Id.* at 55.

pro-claimant nature of the VA system.[9] As correctly expressed by the Court of Appeals for Veterans Claims, this emphasis extends to guidance in statutory interpretation:

> Consequently, even were we to find some ambiguity in the statute, which we do not, we would be compelled to resolve " 'interpretative doubt . . . in the veteran's favor'." *Boyer v. West,* 210 F.3d 1351, 1355 (Fed. Cir. 2000) (quoting *McKnight v. Gober,* 131 F.3d 1483, 1485 (Fed. Cir. 1997) (quoting *Brown v. Gardner,* 513 U.S. 115, 118, 130 L. Ed. 2d 462, 115 S. Ct. 552 (1994))); *see Allen v. Brown,* 7 Vet. App. 439, 448 (en banc) (applying

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[9] For example, in *Hensley v. West,* 212 F.3d 1255 (Fed. Cir. 2000), faced with a similar policy question concerning the level of procedural requirements appropriate for the veterans benefit system, we expressed that:

> a low evidentiary threshold is particularly appropriate in the veterans context because in the early stages of the application process, the veteran is almost always unassisted by legal counsel. *See* 38 U.S.C. § 5904(c)(1) (attorneys and agents prevented from charging for services rendered prior to date of final decision from BVA). Since significant if not essential evidence regarding the merits of a claim often resides in the DVA's files, it would be fundamentally unfair to erect a steep evidentiary hurdle in front of an unassisted veteran before allowing the veteran to receive assistance from the DVA. The low threshold is also appropriate in light of the *uniquely pro-claimant nature of the veterans compensation system.* See *Hodge v. West,* 155 F.3d 1356, 1362-64 (Fed. Cir. 1998) (recognizing that the veterans benefit system is "uniquely pro-claimant"); *Hayre v. West,* 188 F.3d 1327, 1333-34 (Fed. Cir. 1999) (pointing out Congress's recognition of "the strongly and uniquely pro-claimant system of awarding benefits to veterans").

Id. at 1262 (emphasis added). This same fundamental unfairness attaches to the addition of a procedural requirement to the clearly defined NOD.

> *Gardner* to resolve interpretative doubt in veteran's favor).

Gallegos at 56.

The interpretative guidance expressed by this pro-claimant policy further informs our job at step one of the *Chevron* analysis. Compounded with the plain meaning and structure of § 7501, and in light of our precedent, the meaning of "notice of disagreement" is clearly specified by Congress and does not reasonably leave any "gap" which the VA need fill by regulation.

For the foregoing reasons, I would affirm the Court of Appeals of Veterans Claims.

United States Court of Appeals
for the Federal Circuit

01-7037

RAYMOND GALLEGOS,

Claimant-Appellee,

v.

ANTHONY J. PRINCIPI, Secretary of Veterans Affairs,

Respondent-Appellant.

JUDGMENT

ON APPEAL from the United States Court of Appeals for Veterans Claims

IN CASE NO(S) 99-106

This CAUSE having been heard and considered, it is

ORDERED and ADJUDGED:

REVERSED and REMANDED

ENTERED BY ORDER OF THE COURT

DATED: March 15, 2002

/s/ Jan Horbaly/KC
Jan Horbaly, Clerk

ISSUED AS A MANDATE: June 14, 2002

Raymond GALLEGOS, Appellant,

v.

Hershel W. GOBER, Acting Secretary of Veterans Affairs, Appellee.

No. 99-106.

United States Court of Appeals
For Veterans Claims.

Decided Aug. 11, 2000.

James W. Stanley, Jr., of North Little Rock, Arkansas, was on the brief for the appellant.

Leigh A. Bradley, General Counsel; Ron Garvin, Assistant General Counsel; Mary Ann Flynn, Acting Deputy Assistant General Counsel; and Gregory W. Fortsch, all of Washington, D.C., were on the brief for the appellee.

Before NEBEKER, Chief Judge, and FARLEY and STEINBERG, Judges.

STEINBERG, Judge, filed the opinion of the Court. FARLEY, Judge, filed a dissenting opinion.

STEINBERG, Judge:

The appellant, Vietnam veteran Raymond Gallegos, appeals through counsel a December 9, 1998, Board of Veterans' Appeals (BVA or Board) decision that denied entitlement to an earlier effective date for the award of Department of Veterans Affairs (VA) service connection for post-traumatic stress disorder (PTSD). Record (R.) at 9. The appellant has filed a brief, and the Secretary has filed a brief. This appeal is timely and the Court has jurisdiction pursuant to 38 U.S.C. § 7252(a). For the reasons set

forth below, the Court will reverse the BVA decision and remand the matter to the Board for proceedings consistent with this opinion.

I. Background

The veteran served on active duty from September 1966 to May 1970. R. at 12. In March 1992, he filed a claim for VA service connection for diabetes and chloracne. R. at 95-98. In a statement received by a VA regional office (RO) on August 31, 1993, he amended the claim to include a claim for service connection for PTSD. R. at 190a. A February 1993 social history, prepared by a private social worker, contained a diagnosis of PTSD. R. at 184. A November 1993 VA examination failed to make a diagnosis of PTSD and recommended hospital observation and evaluation. R. at 217. An April 1994 discharge summary, which included a mental status examination and psychological testing, included a diagnosis of dependent personality but not of PTSD. R. at 219-20. In September 1994, the VARO determined that the evidence of record failed to show a diagnosis of PTSD and denied the appellant's claim. R. at 222-24. On October 11, 1994, the appellant's representative at the time, the Disabled American Veterans (DAV), submitted a letter, entitled "Memo to Rating Board" [hereinafter "DAV letter"], which stated in full:

> After review of this veteran's claims file and the current rating decision, it is our opinion that denial of the veteran's claim for [PTSD] was a little bit premature. Further development, i.e., review of the Social Worker's statement in regards to referral to the Environment Support Group for verification of specific incidents for stressors

> would prove beneficial to fair evaluation of this veteran's claim.
>
> We suggest careful gleaning of the information from the Social Worker's statement would give sufficient detail without delay to request thorough investigation.
>
> Please do not forward this veteran the standard stressor development letter.
>
> Your appropriate attention is appreciated.

R. at 228.

The claim lay dormant until February 20, 1997, when the veteran, through attorney James W. Stanley, Jr., filed an application to reopen the disallowed service-connection claim for PTSD. R. at 272. In October 1997, the RO granted service connection for PTSD and assigned a February 20, 1997, effective date. R. at 332-35. Also in October 1997, the veteran filed a Notice of Disagreement (NOD) as to the assigned effective date. R. at 339. At a March 1998 hearing, Mr. Stanley indicated that an issue was whether the DAV letter was an NOD as to the September 1994 RO decision. R. at 367.

In the December 1998 BVA decision here on appeal, the Board determined that the appellant was not entitled to an effective date earlier than February 20, 1997. R. at 1-10. The BVA concluded that, because the September 1994 rating decision had become final when the appellant failed to file a valid NOD, an effective date of August 31, 1993, the date of receipt of the appellant's original claim for PTSD service connection, was not warranted. R. at 4. The Board decided that the DAV letter was not a valid NOD as to the September 1994 RO decision because, although it

could reasonably be construed as disagreeing with the RO decision, it "could not be reasonably construed to indicate the appellant's desire for appellate review". R. at 8. The BVA stated that a note attached to the letter reflected that the RO had understood it to be a request for further development. *Ibid.* In their briefs, the appellant and the Secretary both indicate that they are unable to locate this note. Appellant's Brief (Br.) at 8; Secretary's Br. at 7. The note is not part of the record on appeal (ROA) before the Court.

II. Analysis

A. Effective-Date Law

The determination of the effective date for an original claim is governed by 38 U.S.C. § 5110(a), which provides:

> Unless specifically provided otherwise in this chapter, the effective date of an award based on an original claim, a claim reopened after final adjudication, or a claim for increase, of compensation, dependency and indemnity compensation, or pension, shall be fixed in accordance with the facts found, but shall not be earlier than the date of receipt of application therefor.

See also 38 C.F.R. § 3.400(b)(2) (1999) (providing that effective date shall be date of receipt of claim or date entitlement arose, whichever is later, unless claim received within one year after separation from service); *Tucker v. West,* 11 Vet.App. 369, 372 (1998) (concerning effective date of original claim for service connection); *Dinsay v. Brown,* 9 Vet.App. 79, 87 (1996). In his brief, the appellant advises the Court that at issue here is "whether

or not [the DAV letter] was a valid NOD, thereby establishing an earlier effective date" for the PTSD service-connection award. Br. at 6. If the appellant is correct that the DAV letter was a valid NOD, his 1993 claim remains open and pending, and thereby pertinent to the decision on the proper effective date for his PTSD rating. *See* 38 C.F.R. § 3.160(c) (1999) (a "[*p*]*ending claim*" is an "application, formal or informal, which has not been finally adjudicated"). Although this law forms the backdrop for this case and shows why the NOD question is critical to the outcome of the merits decision as to effective date, the Court will address only the NOD question in this opinion.

B. NOD Statute and Regulation

Section 7105 of title 38 of the U.S.Code provides as follows in pertinent part:

> (a) *Appellate review will be initiated* by a notice of disagreement and completed by a substantive appeal after a statement of the case is furnished as prescribed in this section. Each appellant will be accorded hearing and representation rights pursuant to the provisions of this chapter and regulations of the Secretary.
>
> (b)(1) Except in the case of simultaneously contested claims, notice of disagreement ***shall be filed within one year from the date of mailing of notice of the result of initial review or determination***. Such notice, and appeals, must be ***in writing and be filed with the activity which entered the determination with which disagreement is expressed*** (hereafter referred to as the "agency of original jurisdiction" [(AOJ)]). A notice of disagreement postmarked

before the expiration of the one-year period will be accepted as timely filed.

(2) ***Notices of disagreement, and appeals, must be in writing and may be filed by the claimant, the claimant's legal guardian, or such accredited representative attorney, or authorized agent*** as may be selected by the claimant or legal guardian. Not more than one recognized organization, attorney, or agent will be recognized at any one time in the prosecution of a claim.

(c) If no notice of disagreement is filed in accordance with this chapter within the prescribed period, the action or determination shall become final and the claim will not thereafter be reopened or allowed, except as may otherwise be provided by regulations not inconsistent with this title.

(d)(1) Where the claimant, or the claimant's representative, within the time specified in this chapter, files a notice of disagreement with the decision of the agency of original jurisdiction, ***such agency will take such development or review action as it deems proper under the provisions of regulations not inconsistent with this title. If such action does not resolve the disagreement either by granting the benefit sought or through withdrawal of the notice of disagreement, such agency shall prepare a statement of the case . . . .***

(Emphasis added.)

The Secretary has promulgated the following regulation implementing 38 U.S.C. § 7105 that purports to define what constitutes an NOD:

> A written communication from a claimant or his or her representative expressing dissatisfaction or disagreement with an adjudicative determination by the agency of original jurisdiction and a desire to contest the result will constitute a Notice of Disagreement. While special wording is not required, the Notice of Disagreement must be in terms which can be ***reasonably construed as disagreement with that determination and a desire for appellate review.*** If the agency of original jurisdiction gave notice that adjudicative determinations were made on several issues at the same time, the specific determinations with which the claimant disagrees must be identified . . . .

38 C.F.R. § 20.201 (1999) (emphasis added). "'Whether a document is an NOD is a question of law for the Court to determine de novo under 38 U.S.C. § 7261(a).'" *Buckley v. West,* 12 Vet.App. 76, 82 (1998) (quoting *Beyrle v. Brown,* 9 Vet.App. 24, 27-28 (1996)). Accordingly, determining the effect of the regulatory language emphasized above is the crux of this case.

C. Relationship Between Statute and Regulation

In its December 1998 decision, the BVA determined that the DAV letter was not a valid NOD because, although it may be read as expressing disagreement with the September 1994 RO decision, it "could not be reasonably construed to indicate the appellant's desire for appellate review" by the Board, as the Board construed the regulation (§ 20.201) to require. The specific requirement that an NOD "must be in terms which can be reasonably construed as . . . a desire for appellate review" by the BVA is not stated in section 7105 or anywhere else in [sic]

statute. Thus, the Court must consider the validity of this regulatory provision. *See Gardner v. Derwinski,* 1 Vet.App. 584, 586 (1991), *aff'd sub nom. Gardner v. Brown,* 5 F.3d 1456 (Fed.Cir.1993), *aff'd,* 513 U.S. 115, 115 S.Ct. 552, 130 L.Ed.2d 462 (1994).

"'The starting point in interpreting a statute is its language.'" *Lee (Raymond) v. West,* 13 Vet.App. 388, 394 (2000) (quoting *Good Samaritan Hospital v. Shalala,* 508 U.S. 402, 409, 113 S.Ct. 2151, 124 L.Ed.2d 368 (1993)).

> The "plain meaning [of a statute] must be given effect unless a 'literal application of [the] statute [or regulation] will produce a result demonstrably at odds with the intention of its drafters.'" *Gardner* [, *supra*]; *Fagan*[*v. West*], 13 Vet.App. [48,] 52 [(1999)]; *Curtis*[*v. West*], 11 Vet.App. [129,] 133 [(1998)]. "If the intent of Congress is clear, that is the end of the matter". *Skinner v. Brown,* 27 F.3d 1571, 1572 (Fed.Cir. 1994) (quoting *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.,* 467 U.S. 837, 842, 104 S.Ct. 2778, 81 L.Ed.2d 694 . . . (1984)), *aff'ing* 4 Vet.App. 141 (1993) (mem.).

Lee (Raymond), supra. Here, the statute provides clearly on its face that appellate review is initiated by a "notice of disagreement". The statute specifies the five elements for such an NOD: That it must (1) express disagreement with a specific determination of the agency of original jurisdiction (generally a decision by an RO [hereinafter referred to as "RO decision"]) (§ 7105(d)(2)); (2) be filed in writing (§ 7105(b)(1), (b)(2)); (3) be filed with the RO (§ 7105(b)(1)); (4) be filed within one year after the date of mailing of notice of the RO decision (§ 7105(b)(1)); and (5) be filed by the claimant or the claimant's authorized representative

(§ 7105(b)(2)). The only content requirement is an expression of "disagreement" with the decision of the RO.

Here, a plain reading of 38 U.S.C. § 7105 shows a statutory scheme whereby a document that satisfies the five specified elements is an NOD and thereby ***initiates*** appellate review. The NOD triggers a series of sequential steps that may lead to an appeal to the Board. The *first step* of the ensuing process initiated by an NOD under section 7105(d)(1) is the "development or review action" taken by the RO to try to resolve the disagreement. Specifically, VA regulations require that, after an NOD is timely filed, the RO "must reexamine the claim and determine if additional review or development is warranted". 38 C.F.R. § 19.26 (1999). Thereafter, and only "[i]f such action does not resolve the disagreement either by granting the benefit sought or through withdrawal of the" NOD, the RO issues an SOC (or a Supplemental SOC (SSOC)). 38 U.S.C. § 7105(d)(1); *see* 38 C.F.R. § 19.26.

The clarity and completeness of the statute has been determined by our opinion in *Tomlin v. Brown,* 5 Vet.App. 355 (1993). In applying § 20.201 in *Tomlin,* this Court held that "we construe the regulation to impose no technical formal requirements for an NOD beyond the requirements set by the statute, for to impose any such requirement would exceed the Secretary's [regulatory] authority . . . [under] 38 U.S.C.[ ] § 501". *Tomlin,* 5 Vet.App. at 357; *see* 38 U.S.C. § 501(a) ("[t]he Secretary has authority to prescribe all rules and regulations which are necessary or appropriate to carry out the laws administered by the Department and are consistent with those laws"); *Lee (Raymond),* 13 Vet.App. at 397 ("Secretary's authority under section 501(a) is restricted to actions that are 'consistent with [the] laws [administered by VA]' "). The

Court so held in the context of construing the statutory requirement that an NOD "must be in writing" as being satisfied by the printed transcript of an RO hearing. *Ibid.* In sustaining that transcript as an NOD, the Court in *Tomlin* made ***no*** reference to any "desire for appellate review", but rather stated only:

> [W]e find that the oral statement of appellant's accredited representative at the May 1988 hearing, that appellant continued to claim a 20% rating, meets the statutory definition of an NOD. It was timely, it was addressed to the AOJ, and it was presented by appellant's accredited representative. When it was transcribed on July 25, 1988, it met the remaining statutory requirement that it be "in writing." We must conclude that, ***having met all statutory requirements,*** the statement in question was the NOD as to the claim now on appeal. The date of certification of the transcript by VA is the date of filing.

Id. at 357-58 (emphasis added).

In other words, *Tomlin* required ***only*** that the NOD be timely filed with the RO and express disagreement by seeking a higher rating (thereby implying dissatisfaction with the lower rating assigned by the RO), be filed by or for the claimant, and be "in writing". It did not require – or even refer to – an expression of a desire for appellate review, or a reasonable implication of such a desire, as the regulation appears to call for. Indeed, we can find no precedential action of this Court that has held that a document that satisfied the five statutory elements was not a valid NOD ***solely*** because it did not express "a desire for appellate review". *Cf. Fenderson v. West,* 12 Vet.App. 119, 128 (1999) (NOD sustained that included statement "[p]lease send me a statement of the case", i.e., reference

to appeal process); *Buckley,* 12 Vet.App. at 79 (NOD sustained that stated "please accept this as a Notice of Disagreement", i.e., called itself NOD); *Beyrle,* 9 Vet.App. at 27 (NOD sustained that requested "new SSOC be issued and that there be an 'expeditious transfer of the file to the [Board]'", i.e., included reference to appeal process). The Court in *Tomlin* thus, by implication, read out of the regulation any added requirement of an expression of a desire for appellate review; indeed, as we noted above, the Court made no reference to that part of the regulation although it quoted the other decisive portions of it. *Tomlin,* 5 Vet.App. at 357.

The difficulty with § 20.201 is that it may be read as implying that a VA claimant must intend to appeal ***to the Board*** at the time that he or she files an NOD. Indeed, this is how our dissenting colleague seems to interpret the regulation. *Infra* at 60-61. Any such construction makes no sense under the statutory scheme, however. All that an NOD-filing claimant need desire is review and development by the ***RO*** followed by its issuance of an SOC (or SSOC) if the claimant's disagreement is not resolved by the RO. This is the process required by section 7105(d)(1). Ultimately, if the claimant is still dissatisfied after receiving the SOC (or SSOC), he or she ***then*** may pursue an appeal ***to the BVA*** by filing a Substantive Appeal, and only then does the case go forward to the Board for its review. In other words, after an NOD is filed, it is quite possible that it may not become necessary to transmit the case to the BVA.

How then can it be reasonable for the Secretary to require that every denied VA claimant must, at the time he or she files an NOD, express a desire for BVA review? The answer is quite simply that it cannot be reasonable

and that, accordingly, such a regulatory requirement would not be "consistent with" the statutory provisions, as it must be in order to be a valid regulatory requirement promulgated under 38 U.S.C. § 501(a). Indeed, the Secretary could promulgate a regulation only if the statute left a "gap" to be filled in by the Secretary, *see Chevron U.S.A. Inc.*, 467 U.S. at 843, 104 S.Ct. 2778; *see also Lee (Raymond)*, 13 Vet.App. at 395-96. As we recently held in *Lee (Raymond)*:

> The deficiency in the Secretary's contention that the statute leaves a "gap" for him to fill in becomes all the more apparent when we apply the injunction that "when interpreting statutes, the court is required to look at the context and provisions of the law as a whole." *Degmetich v. Brown*, 104 F.3d 1328, 1332 (Fed.Cir.1997).

Lee (Raymond), 13 Vet.App. at 395. Regarding section 7105, as we have already indicated, the *Tomlin* opinion stands for the proposition that the statute creates a full and complete process for initiating and perfecting a request for "appellate review" following the filing of an NOD that initiates the sequential steps in that review process that ***may*** lead to review by the BVA on appeal. Hence, we conclude that there is no "gap" in this statutory scheme and that the Secretary, rather than having filled in the gap conjured up by the dissenting opinion, has by regulation raised a barrier to appellate review where none exists in section 7105.

Moreover, in considering the validity of the Secretary's NOD regulation, we must bear in mind that we are expounding upon an adjudication system deliberately designed by Congress to be pro-claimant. *See Hensley v. West*, 212 F.3d 1255, 1262 (Fed.Cir.2000); *Hayre v. West*,

188 F.3d 1327, 1333 (Fed.Cir.1999); *Hodge v. West,* 155 F.3d 1356, 1362-64 (Fed.Cir.1998). Consequently, even were we to find some ambiguity in the statute, which we do not, we would be compelled to resolve " 'interpretative doubt . . . in the veteran's favor' ". *Boyer v. West,* 210 F.3d 1351, 1355 (Fed.Cir.2000) (quoting *McKnight v. West,* 131 F.3d 1483, 1485 (Fed.Cir.1997) (quoting *Brown v. Gardner,* 513 U.S. 115, 118, 115 S.Ct. 552, 130 L.Ed.2d 462 (1994))); *see Allen v. Brown,* 7 Vet.App. 439, 448 (en banc) (applying *Gardner* to resolve interpretative doubt in veteran's favor).

Finally, we must not lose sight of the forest as we examine the trees in it. An NOD operates not only as the linchpin to a VA claimant's obtaining full administrative review from the Secretary but also as the indispensable ticket to judicial review in this Court. Congress specifically provided in Veterans' Judicial Review Act (VJRA) section 402 that judicial review would be available when an NOD "filed under section [7105]" is submitted on or after the enactment of the VJRA. *See* VJRA, Pub.L. No. 100-687 § 402, 102 Stat. 4105, 4122 (1988) (found at 38 U.S.C. § 7251 note); *Barrera v. Gober,* 122 F.3d 1030, 1031 (Fed.Cir.1997); *Grantham v. Brown,* 114 F.3d 1156, 1157 (Fed.Cir.1997), *rev'g* 8 Vet.App. 228 (1995); *Hamilton v. Brown,* 4 Vet.App. 528, 531 (1993) (en banc), *aff'd,* 39 F.3d 1574 (Fed.Cir.1994). Without an effective NOD, therefore, a VA claimant cannot obtain access to this Court. To permit the Secretary – by adding via regulation to the statutory requirements for an NOD – to insulate from Court review adjudicative decisions made on his behalf would fly in the face of the remedial nature of the VJRA in providing judicial review to veterans and other VA claimants. *See Smith (William) v. Brown,* 35 F.3d 1516, 1525 (Fed.Cir.1994) ("courts are to construe remedial statutes

liberally to effectuate their purposes . . . [and v]eterans benefits statutes clearly fall in this category"). It would be just as unconscionable to allow the Secretary to erect such "a shield against judicial review" as it would have been for us to have allowed the BVA Chairman to "defeat the right to judicial review at a critical juncture in a case by ordering reconsideration of a prior [BVA] decision which is beyond the reach of that right." *Smith (George) v. Brown,* 8 Vet.App. 546, 553 (1996) (en banc). As Judge Plager wrote in *Barrera,* "when construing ambiguities in the [VJRA], we should err, if we err at all, on the side of protecting a veteran's right to the judicial review Congress has mandated." *Barrera,* 122 F.3d at 1040 (Plager, J., concurring). In light of the foregoing analysis, there is no basis for affording the Secretary even the slightest latitude to make it more difficult for a claimant to file an NOD when VA already has on file a document that satisfies the statutory criteria for an NOD.

D. Application of Law to Facts of Case

In the instant case, the Board interpreted the "appellate review" language in § 20.201 as follows:

> The purpose of the Notice of Disagreement is to initiate appellate review by informing VA, within one year from the date of VA's mailing of the notice of the result of a determination by an RO[,] of the claimant's ***intent to appeal to the Board***. *Tomlin* [ ], 5 Vet.App. [at] 357 . . . .
>
> The Board finds that the October 1994 letter can be construed by a broad and favorable interpretation to indicate that the appellant was in disagreement with the September 1994 rating

> decision. The representative indicated the decision was "premature" and asked for further development of the [PTSD] stressors, which can be construed to indicate his dissatisfaction with the denial of service connection.
>
> However, the letter cannot be reasonably construed to indicate the appellant's desire for appellate review. ***The letter submitted by an accredited representative did not give the VA notice of intent to appeal to the Board.*** It was in every way a request that the RO take further action in developing stressor evidence. The note attached to the letter reflects the RO's understanding that it was a request for further development and that there was no actual notice of intent to appeal.

R. at 7-8 (emphasis added). As our foregoing discussion demonstrates, the Board was mistaken in its interpretation of § 20.201. Although some prior decisions of this Court may have, in dictum, given credence to similar interpretations, as has been established above the Court has never ***directly*** addressed this issue. We do so now, and hold that § 20.201, to the extent that it might be read as requiring that an NOD express a desire for ***BVA review***, runs afoul of the *Tomlin* injunction against VA's adding a "technical formal requirement[ ] for an NOD beyond the requirements set by the statute" and thereby "exceed[s] the Secretary's authority" to prescribe regulations under 38 U.S.C. § 501. *Tomlin,* 5 Vet.App. at 357; *see also Bernier v. Brown,* 7 Vet.App. 434, 438 (1995) (invalidating VA regulation to the extent that Secretary's interpretation of it is followed).

Therefore, insofar as § 20.201 may be interpreted as adding a requirement of an expression of a desire for ***BVA***

review, we hereby invalidate it. *See Lee (Raymond),* 13 Vet.App. at 397; *Bernier* and *Gardner,* both *supra.* To the extent that § 20.201 may be read as requiring only an expression of a desire for further development and review action by the RO, it adds nothing to the statutory language requiring an expression of disagreement; that is, such a desire is inherent in the submission of an NOD under section 7105 given the sequential steps it establishes once an NOD is filed to "initiate[ ]" "[a]ppellate review". 38 U.S.C. § 7105(a); *cf. Strott v. Derwinski,* 964 F.2d 1124, 1127 (Fed.Cir.1992) (holding that hearing at RO held after NOD and Substantive Appeal are filed "is part of the appellate process"). In either event, the regulatory reference to "a desire for appellate review" cannot support finding invalid as an NOD a document that otherwise complies with the five section 7105 elements of an NOD. Indeed, to hold otherwise would be contrary to the legislative history accompanying the adoption in 1962 of the NOD legislative language; the Senate committee then stated that the purpose of the bill regarding NODs was to "place the veteran . . . in a better position to develop new evidence available and to fully prepare and present his appeal". S.Rep. No. 1843 (1962), *reprinted in* U.S.C.C.A.N. 2570, 2577.

It is this very same further development and review by the RO that the DAV letter was requesting in this case. Because such further preparation is contemplated by section 7105(d)(1) after the submission of an NOD (i.e., further RO development and review), holding that the document at issue here is not an NOD would frustrate that legislative intent because, in this case, the veteran ***specifically requested*** further preparation.

E. DAV Letter Constituted NOD

It is undisputed that the DAV letter fulfilled the five section 7105 elements of an NOD: It (1) expressed disagreement with an RO decision, (2) was in writing, (3) was filed with the RO, (4) was filed within one year after the date of mailing of notice of the result of that RO decision, and (5) was filed by the claimant's authorized representative. *See* 38 U.S.C. § 7105; R. at 7-8; Appellant's Br. at 7; Secretary's Br. at 3, 7. The Board expressly found as fact that the DAV letter can "be construed . . . to indicate that the appellant was in disagreement with the September 1994 rating decision". R. at 8. Because, as we held above, 38 C.F.R. § 20.201 ***cannot*** be read as imposing any formal requirements beyond those set by 38 U.S.C. § 7105, *see Tomlin, supra,* and, because the expression of a desire for appellate review is either such an impermissible added requirement or an ***inherent*** element of an NOD, the requirements of the statute are all that the veteran was required to satisfy, and it is undisputed that he did so via the DAV letter. Accordingly, we hold that the veteran filed a valid NOD as to the September 1994 RO decision. Therefore, the Court will reverse the December 1998 BVA decision to the contrary and remand the claim to the Board for further adjudication as to the effective date of the award of service connection for the veteran's PTSD. *See* 38 U.S.C. § 7261(a)(1).

III. Conclusion

Upon consideration of the ROA and the pleadings of the parties, the Court reverses the December 9, 1998, BVA decision and remands the matter to the BVA for proceedings consistent with this opinion. The Court notes that a remand by this Court and by the Board confers on an

appellant the right to VA compliance with the terms of the remand order and imposes on the Secretary a concomitant duty to ensure compliance with those terms. *See Stegall v. West,* 11 Vet.App. 268, 271 (1998). A final decision by the Board following the remand herein ordered will constitute a new decision that, if adverse, may be appealed to this Court only upon the filing of a new Notice of Appeal with the Court not later than 120 days after the date on which notice of the new Board final decision is mailed to the appellant. *See Marsh v. West,* 11 Vet.App. 468, 472 (1998).

REVERSED AND REMANDED.

FARLEY, Judge, dissenting:

In my view, 38 C.F.R. § 20.201 was promulgated by the Secretary pursuant to his lawful authority and its substantive terms are fully consonant with the spirit and the letter of the scheme of title 38, U.S.Code. Therefore, I cannot join with the majority in striking down that regulation. Nor can I agree to a reversal of the BVA decision which properly interpreted the regulation and applied it to the facts presented in this matter. Thus, I respectfully dissent.

Section 7105 of title 38, U.S.Code, provides that

> "[a]ppellate review will be initiated by a notice of disagreement . . . [which] shall be filed within one year from the date of mailing of notice of the result of initial review or determination. Such notice . . . must be in writing and be filed with the activity which entered the determination with which disagreement is expressed . . . . Notices of disagreement . . . must be in writing and may be filed by the claimant, the claimant's legal

> guardian, or such accredited representative attorney, or authorized agent. If no notice of disagreement is filed in accordance with this chapter within the prescribed period, the action or determination shall become final . . . ."

The term "notice of disagreement" is not defined further either by section 7105 or by section 101 of title 38 U.S.Code, which provides the definitions "[f]or the purposes of this title." However, pursuant to 38 U.S.C. § 501(a),

> The Secretary has authority to prescribe all rules and regulations which are necessary or appropriate to carry out the laws administered by the Department and are consistent with those laws, including –
>
> (2) the forms of application by claimants under such laws . . . .

To ensure that his agencies of original jurisdiction would be able to facilitate the Congressional mandate that "[a]ppellate review will be initiated by a notice of disagreement," the Secretary, in the exercise of this § 501(a) authority, promulgated 38 C.F.R. § 20.201. In defining the term "notice of disagreement," the Secretary determined that, "[w]hile special wording is not required, the Notice of Disagreement must be in terms *which can be reasonably construed as* disagreement with that determination and *a desire for appellate review.*" (Emphasis supplied.) To my mind, such a requirement is both consistent with the statutory scheme and reasonable as a matter of administrative precaution for, as a decade of experience with judicial review has demonstrated, an agency of original jurisdiction receives innumerable communications from claimants and the claimants' representatives. The RO

must be able to reasonably ascertain a claimant's intention in sending his or her communication to be able to determine what course of action is required by law, and such determinations have to be consistent from RO to RO throughout the nation. The Secretary, in promulgating the regulation, merely articulated that an NOD must be capable of being "reasonably construed" as asking for appellate review so that adjudication officers would be on notice to initiate the review process. This provision is consistent with § 7105 and it fulfills the purpose of an NOD in the process set up under title 38 and as set forth in the statute and its legislative history. *See Meeks v. West,* 216 F.3d 1363, 1366-67 (Fed.Cir.2000) ("[S]tatutory interpretation is a holistic endeavor that requires consideration of a statutory scheme in its entirety"; when interpreting a statute the court should "look to the provisions of the whole law, and to its object and policy." (internal citations omitted)).

As the majority noted, when reviewing a statute, if the Congressional intent is clear, the matter is ended. "If, however, the court determines Congress has not directly addressed the precise question at issue . . . if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute." *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.,* 467 U.S. 837, 842-43, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984) (footnotes omitted). In a footnote in *Chevron,* the Court noted that:

> the court need not conclude that the agency construction was the only one it permissibly could have adopted to uphold the construction, or even the reading the court would have reached if the

> question initially had arisen in a judicial proceeding.

Id. at 843 note 11, 104 S.Ct. 2778. An agency's administration of a program created by Congress "necessarily requires the formulation of policy and the making of rules to fill any gap left, implicitly or explicitly, by Congress." *Id.* at 843, 104 S.Ct. 2778 (quoting *Morton v. Ruiz,* 415 U.S. 199, 231, 94 S.Ct. 1055, 39 L.Ed.2d 270 (1974)). Where "Congress has explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation." These types of regulations are controlling "unless they are arbitrary, capricious, or manifestly contrary to the statute." *Id.* at 843-44, 104 S.Ct. 2778. Where the "legislative delegation to an agency on a particular question is implicit rather than explicit . . . a court may not substitute its own construction of a statutory provision for a reasonable interpretation" made by an agency. *Id.* at 844, 104 S.Ct. 2778.

In *Chevron,* the Supreme Court noted that an agency's construction of a statutory scheme should be given "considerable weight" and that where the meaning of a statute involves "reconciling conflicting policies, and a full understanding of the force of the statutory policy" *(id.)*, if the "choice represents a reasonable accommodation of conflicting policies that were committed to the agency's care by the statute, [the Court] should not disturb it unless it appears from the statute or its legislative history that the accommodation is not one that Congress would have sanctioned." *Id.* at 845, 104 S.Ct. 2778 (quoting *United States v. Shimer,* 367 U.S. 374, 382, 383, 81 S.Ct. 1554, 6 L.Ed.2d 908 (1961)). The Federal Circuit, in reviewing a decision from this Court, recently noted that where the

"statute is silent or ambiguous about a matter, the court gives deference to interpretations of the agency charged with the duty to administer it." *Meeks,* 216 F.3d at 1366; *see also NationsBank v. Variable Annuity Life Ins. Co.,* 513 U.S. 251, 256, 115 S.Ct. 810, 130 L.Ed.2d 740 (1995) ("It is settled that courts should give great weight to any reasonable construction of a regulatory statute adopted by the agency charged with the enforcement of that statute.") (quoting *Clarke v. Securities Industry Assn.,* 479 U.S. 388, 403-04, 107 S.Ct. 750, 93 L.Ed.2d 757 (1987) (quoting *Investment Company Institute v. Camp,* 401 U.S. 617, 626-27, 91 S.Ct. 1091, 28 L.Ed.2d 367 (1971))).

Congress did not specifically address the question this appeal raises: what constitutes an NOD? Although it can be concluded from the language of § 7105 and the term "notice of disagreement" itself that an NOD is a written communication expressing disagreement with an RO decision, no further guidance of a substantive nature has been offered by Congress. Whereas the majority sees this statutory void as somehow preventing the Secretary from promulgating a substantive regulation, I believe it is more properly viewed as a gap which not only could but should be filled by regulation under the Secretary's authority and responsibility to promulgate all rules and regulations that are necessary for carrying out the laws he administers. This delegation specifically included the forms of applications by claimants. 38 U.S.C. § 501(a)(2).

Just like the statutory language, the legislative history does not help to answer the question of what an NOD must contain. The portion of the legislative history cited by the majority does not define an NOD but describes its purpose, i.e., "to fully prepare and present [the veteran's] appeal." S.Rep. No. 1843, 1962 U.S.Code Cong. &

Admin.News 2570, 2577; *Ante* at 57. Since nothing in the statute or its legislative history speaks to what should be contained in an NOD, the only question is whether the guidance provided by the Secretary in 38 C.F.R. § 20.201 is a "reasonable interpretation" of § 7105, and if the regulation "represents a reasonable accommodation of conflicting policies that were committed to the [Secretary's] care by [title 38]." *Chevron,* 467 U.S. at 845, 104 S.Ct. 2778. I believe it is and it does.

The majority purports to find support for its views in *Tomlin v. Brown,* 5 Vet.App. 355 (1993) but its analysis cannot withstand scrutiny. In *Tomlin* the portion of the regulation at issue was that part which required that an NOD be a "written communication." The Court found that the statements of the appellant's representative at an RO hearing which had been transcribed satisfied the requirement that an NOD be in writing. In my view, *Tomlin* stands only for the proposition that, to the extent that 38 C.F.R. § 20.201 may be read to require the claimant or the claimant's representative's to actually be the one to write the communication expressing disagreement, such a requirement would be beyond the Secretary's authority. The issue presented in this appeal was neither presented nor discussed in *Tomlin.* Undaunted by this apparent hurdle, the majority concludes that "[t]he Court in *Tomlin* thus, *by implication,* read out of the regulation any added requirement of an expression of a desire for appellate review." *Ante* at 55-56 (emphasis supplied). I cannot find in *Tomlin* the "implication" the majority here found, but even if I were able to catch a fleeting glimpse of one, I could not attach to it the significance the majority purports to discern. Nor can I agree with the majority's finding that *Tomlin* determined once and forever "[t]he

clarity and completeness of the statute" or that it can stand for as large a "proposition" as the majority here attempts to lay down. *Ante* at 54-55. If the import of the majority's holding is that the Court, by quoting only a part of a regulation, effectively strikes down the omitted sections of that regulation, then through the decisions of this Court large segments of the VA regulatory scheme must already have been eviscerated.

The portion of the regulation at issue here does not run afoul of the maxim set forth in *Tomlin,* and relied upon by the majority, that the Secretary by regulation cannot impose any specific technical requirements not authorized by the statute. *Tomlin,* 5 Vet.App. at 357. The provision that the terms of the NOD be capable of being construed as seeking appellate review imposes no such technical requirement. The regulation does not require certain words or phrases; in fact, it recognizes that "special wording is not required." 38 C.F.R. § 20.201. As the statute makes clear, the NOD is a document filed to initiate appellate review and it is therefore reasonable for the Secretary to require that the communication filed by the claimant somehow indicate that appellate review is what he or she seeks. The majority asks the question how "can it be reasonable for the Secretary to require that every denied VA claimant must, at the time he or she files an NOD, express a desire for BVA review?" *Ante* at 55-56. The better question, given the nature of claims adjudication, the myriad pieces of correspondence, and the need for national consistency, is "how could such a requirement be unreasonable?" The answer is: the "desire for appellate review" provision of 38 C.F.R. § 20.201 is not unreasonable, and there is no basis in statutory or case law for

striking that regulation as the majority does today. Mindful of the deference to be accorded an agency's construction of a statute, I would find the subject regulation to be a "reasonable interpretation" of 38 U.S.C. § 7105. *See Chevron, Meeks,* and *NationsBank,* all *supra.*

In its decision, the majority points to the fact that the system of veterans benefits is designed to be pro-claimant, invoking Judge Plager's admonition in *Barrera* that a veteran's right to judicial review be protected. *Ante* at 56-57. There is nothing in this regulation which is anti-claimant or which erects "a barrier to appellate review where none exists in section 7105." *Ante* at 56. Congress has set forth certain procedures for obtaining judicial review and, as the majority must and has conceded, the initial requirement is a valid NOD. Section 20.201 is nothing more than "the formulation of policy and the making of rules" required of the Secretary in order to give form to the process leading to the judicial review mandated by Congress under the VJRA. *See Chevron,* 467 U.S. at 843, 104 S.Ct. 2778.

Turning to the facts, and presuming the continuing vitality of § 20.201, when determining whether a document constitutes an NOD, the Court looks at both the actual wording and the context in which the communication was written. *Jarvis v. West,* 12 Vet.App. 559, 561 (1999). The October 1994 DAV letter calls the RO decision "premature," states the belief that "[f]urther development . . . would prove beneficial to fair evaluation of this veteran's claim," and "suggest[s] careful gleaning of the information from the Social Worker's statement would give sufficient detail without delay to request thorough investigation." R. at 228. The author of this "Memo to Rating Board" was an employee of the Disabled American

Veterans, a recognized veterans service organization whose representatives are permitted to prosecute claims under the laws administered by VA. *See* 38 U.S.C. § 5902. That being so, it is reasonable to expect that the DAV is aware of the requirements for a valid NOD and for seeking appellate review of an RO decision under the pertinent statutes and regulations. The Board held that the DAV letter, while it may be construed to express disagreement with the RO decision, cannot be reasonably construed to express a desire for appellate review. Because I find no factual or legal error in that conclusion, I would affirm the BVA determination that the October 1994 DAV letter is not a valid NOD. Therefore, I respectfully dissent.

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

01-7037

RAYMOND GALLEGOS,

Claimant-Appellee,

v.

ANTHONY J. PRINCIPI, Secretary of Veterans Affairs,

Respondent-Appellant.

ORDER

(Filed Jun. 7, 2002)

A petition for rehearing en banc having been filed by the APPELLEE, and a response thereto having been invited by the court and filed by the APPELLANT, and the matter having first been referred as a petition for rehearing to the panel that heard the appeal, and thereafter the petition for rehearing en banc and response having been referred to the circuit judges who are in regular active service,

UPON CONSIDERATION THEREOF, it is

ORDERED that the petition for rehearing be, and the same hereby is, DENIED and it is further

ORDERED that the petition for rehearing en banc be, and the same hereby is, DENIED.

The mandate of the court will issue on June 14, 2002.

FOR THE COURT,

/s/ Jan Horbaly (AV)
Jan Horbaly
Clerk

Dated: June 7, 2002

cc: Lawrence N. Minch
Kenneth M. Carpenter

GALLEGOS V DVA, 01-7037
(CVA – 99-106)

Note: Pursuant to Fed. Cir. R. 47.6, this order is not citable as precedent. It is a public record.

01-7037

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

RAYMOND GALLEGOS

Claimant-Appellee,

v.

ANTHONY J. PRINCIPI,
Secretary of Veteran Affairs,

Respondent-Appellant,

APPEAL FROM UNITED STATES COURT OF APPEALS
FOR VETERANS CLAIMS IN 99-0106
JUDGE JONATHAN R. STEINBERG

APPELLEE'S PETITION FOR REHEARING *EN BANC* AND ADDENDUM

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April 23, 2002

CERTIFICATE OF INTEREST

Pursuant to Federal Circuit Rules 28(a)(1) and 47.4, counsel for Claimant-Appellee Raymond Gallegos certifies the following:

1. The full name of every party or amicus represented by me is:

   Raymond Gallegos

2. The name of the real party in interest represented by me is:

   None

3. The parent companies, subsidiaries and affiliates that have issued shares to the public, of the party or amicus curiae represented by me are:

   None.

4. The name of all law firms and the partners or associates that appeared for the party or amicus now represented by me in the trial court of agency or are expected to appear in this Court are:

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STATEMENT OF COUNSEL

Based on my professional judgment, I believe this appeal requires rehearing by the *en banc* Court because the Panel decision in this matter is inconsistent with one or more precedential opinions of this Court and presents an issue of exceptional importance regarding the requirements to initiate an appeal of an administrative decision of the Department of Veterans Affairs.

/s/ Kenneth M. Carpenter
Kenneth M. Carpenter
Attorney for Appellee
Raymond Gallegos

01-7037

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

RAYMOND GALLEGOS

Claimant-Appellee,

v.

ANTHONY J. PRINCIPI,
Secretary of Veteran Affairs,

Respondent-Appellant,

APPELLEE'S PETITION FOR REHEARING *EN BANC* AND ADDENDUM

Pursuant to Rules 35 of the Federal Rules of Appellate Procedure and this Court's Rules, Raymond Gallegos respectfully moves for a rehearing *en banc* of the March 15, 2002, decision of the Panel decision in this matter which reversed the decision of the United States Court of Appeals for Veterans Claims.

POINTS OF LAW TO BE CONSIDERED

Appellee respectfully submits that the Panel decision of March 15, 2002 failed to follow other precedential decisions of this Court in rendering its decision in this matter. Specifically, the majority decision in this matter afforded deference to the Agency's interpretation of the statute contrary to the precedential opinion in *Skinner v. Brown*, 27 F.3d 1571 (Fed.Cir. 1994) and *Hamilton v.*

Brown, 39 F.3d 1574 (Fed.Cir. 1994). In addition, the majority decision failed to employ the traditional tools of statutory construction regarding the ascertaining of the intent of Congress based upon the plain language of the statute. *See Dole v. United Steelworkers of America*, 494 U.S. 26, 110 S.Ct. 929 (1990).

The majority misapplied the principles of judicial deference articulated by the United States Supreme Court in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). Contrary to the conclusion reached by the majority, the plain meaning and structure of 38 U.S.C. § 7105 leaves no room for an agency to add additional requirements to a NOD: the inquiry does not pass step one of the *Chevron* test. *See Skinner v. Brown*, 27 F.3d 1571, 1572 (Fed.Cir. 1994) ("If the intent of Congress is clear, that is the end of the matter.") (quoting *Chevron* at 842). *See also Brown v. Gardner*, 115 S.Ct. 552 (1996).

There is no "gap" to be found within the plain meaning of 38 U.S.C. § 7105 with respect to the content contemplated by Congress to be included within a notice of disagreement (NOD), to initiate the appellate process. *See* 38 U.S.C. § 7105(a). The majority's creation of a "gap" where no "gap" exists impermissibly upholds a Department of Veterans Affairs regulation by rewriting the statutorily created prerequisites for a notice of disagreement.

Without *Chevron* deference, the regulatory requirement that the NOD must "express a desire for appellate review" as established by the VA's regulation, 38 C.F.R. § 20.201, cannot be upheld. *Gallegos v. Principi*, ___ F.3d ___ No. 01-7037 (Judge Gajarsa's dissent, decided March

15, 2002), slip op. p. 10. The plain meaning of the term "notice of disagreement" does not allow for the addition of procedural requirements, such as expanding the NOD definition to require that claimants also express a desire for appellate review, in order for their NOD to be valid. The plain meaning is not only clear, but obvious. *Gallegos* dissent slip op. p. 11. The Department of Veterans Affairs by regulation improperly added a "technical, formal requirement" to the mandatory content of a NOD to initiate an appeal.

If the statutory language is clear and unambiguous on its face, then there can be no gap, and *Chevron* deference **is not** to be afforded by the reviewing Court. *See Dole v. United Steelworkers of America*, 494 U.S. 26, 42-43, 110 S.Ct. 929, 938 (1990); *Chevron*, 467 U.S. at 842 ("If the intent of Congress is clear, that is the end of the matter"); *Id.* at 843 n. 9 ("If a court, employing traditional tools of statutory construction, ascertains that Congress had an intention on the precise question at issue, that intention is the law and must be given effect.")

The effect of the Agency's regulation, and the majority opinion's conclusion which perceives a gap, is the creation of a **barrier** to appellate review, where **none** is contemplated by the text of 38 U.S.C. § 7105. "This Court has previously reviewed § 7105 and the term 'notice of disagreement' in light of a related but instructive question – whether for jurisdictional purposes § 7105 allows for more than one NOD in a single claim. *Hamilton v. Brown*, 39 F.3d 1574, 1574 (Fed.Cir. 1994). In this review, we explicitly found that there was no gap in meaning for a NOD in § 7105 with respect to this question, and therefore, *Chevron* deference did not apply. *Id.* at 1585." *Gallegos* dissent slip op. p. 11 n. 4.

As a result of the majority's decision, there now exists a conflict in this Court's precedential decisions. In *Hamilton*, this Court found that § 7105 contains **no gap**. In *Gallegos*, as decided by the majority, § 7105 contains **a gap**. The *en banc* Court should convene to resolve this conflict in the Panel decisions of this Court.

CONCLUSION

The Appellee, for the foregoing reasons, urges the Full Court to reconsider this matter *en banc* in light of the conflict which has been created between this Court's decision in *Hamilton* and the instant matter.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that the original and fifteen copies of the above and foregoing document has been shipped by overnight delivery to the Clerk and two copies to the below named counsel for Appellant on the 23rd day of April, 2002, addressed to:

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/s/ Kenneth M. Carpenter
Kenneth M. Carpenter

RESPONSE TO APPELLEE'S PETITION FOR REHEARING *EN BANC*

IN THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

01-7037

RAYMOND GALLEGOS,

Claimant-Appellee,

v.

ANTHONY J. PRINCIPI,
Secretary of Veterans Affairs,

Respondent-Appellant.

ON APPEAL FROM THE UNITED STATES COURT
OF APPEALS FOR VETERANS CLAIMS

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May 14, 2002

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UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

RAYMOND GALLEGOS, Claimant-Appellee,	)	
v.	)	00-7037
ANTHONY J. PRINCIPI, Secretary of Veterans Affairs, Respondent-Appellant.	)	

RESPONSE TO APPELLEE'S PETITION FOR REHEARING *EN BANC*

At the request of the Court, pursuant to Rule 35(e) of the Ferderal [sic] Rules of Appellate Procedure, respondent-appellee, Anthony J. Principi, Secretary of Veterans Affairs, respectfully submits this response to appellee's petition for rehearing *en banc*.

The petition should be denied because it does not establish either (1) that the Panel decision conflicts with any other precedential decision of this Court or the United States Supreme Court, or (2) that this proceeding involves a question of exceptional importance. The question presented to, and correctly decided by, the Panel concerns the routine application of *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43 (1984), to a Department of Veterans Affairs ("VA") regulation defining a statutory term. The Panel correctly ruled that 38 C.F.R. § 20.201, which defines the term "notice of disagreement" ("NOD"), is a permissible construction, or appropriate implementation, of 38 U.S.C. § 7105(a), to which the courts owe deference.

The petition asserts that the Panel decision conflicts with the Court's decisions in *Skinner v. Brown*, 27 F.3d 1571 (Fed Cir. 1994), and *Hamilton v. Brown*, 39 F.3d 1574 (Fed. Cir. 1994). Appellee's Petition For Rehearing *En Banc* ("Pet.") 2. This is incorrect. Neither of these cases addressed the issue decided here, or conflicts with the Panel decision in any way.

Skinner does not concern the validity of 38 C.F.R. § 20.201. In fact, it does not even address the appeal process set forth in section 7105. *Skinner* concerned whether the VA may, by regulation, impose time limits for seeking benefits under the Restored Entitlement Program for Survivors, Pub. L. No. 97-377, 96 Stat. 1920 (1982) (set out as amended at 42 U.S.C. § 402 note (1988)). 27 F.3d at 1572. Applying *Chevron* principles, the Court found the regulation invalid because the plain language of the statute imposed no time restrictions on entitlement. Rather, "it mandates payment of benefits for each month a covered survivor meets the statutory requirment [sic]." *Id.* at 1574.

Contrary to petitioner's suggestion, the Panel decision is entirely consistent with *Skinner's* discussion of *Chevron*. The two decisions apply different prongs of the same analysis. Because *Skinner* found from the statutory language that Congress did not intend to condition benefits on time-specific filing requirements, it invalidated the regulation imposing them. Here, the Panel correctly determined that 38 U.S.C. § 7105 does not define the term "NOD" or address whether an NOD is sufficient that does not contain a request for appellate review. A6. It therefore concluded that the statute "contains a gap for an agency to fill" with regard to the definition of a legally valid NOD. *Id.* (quoting *Chevron*, 467 U.S. at 843).

Similarly, *Hamilton* did not address either the definition of the term "NOD" or the validity of 38 C.F.R. § 20.201. These questions were not raised, nor were they relevant to the issue before the Court. The petition suggests *Hamilton* found that there is no gap in section 7015 concerning the meaning of the term "NOD." Pet. 4-5 (citing the dissent, A12 n.4). *Hamilton* does not so state. Rather, it found that the statutory language and legislative history of section 7105 contained an answer to the narrow question that was before the Court – *i.e.,* whether, for jurisdictional purposes, there can be more than one NOD relating to the same claim. The court held that there cannot. 39 F.3d at 1582. *Hamilton* contains no discussion of whether section 7105 contains "gaps." In fact, it does not concern application of the *Chevron* standard.

Rather than identifying a conflict between the Panel decision and another decision of this Court, the petition merely states its disagreement with the Panel's conclusion that Congress left a gap in 38 U.S.C. § 7105 for the VA to fill by regulations. The petition reargues the position, correctly rejected by the Panel, that any regulation defining the term "NOD" whose language does not merely track the language of the statute must be inconsistent with its plain language, because section 7105 requires no implementation. The Panel decision succinctly states the weakness of this argument:

> The statutory language supplies some requirements for a valid NOD. . . . The statute does not, however, define "notice of disagreement" or suggest sufficient expressions to make a writing an NOD. The statute also does not suggest that its specifications for an NOD – writing, one-year time limit from notice, etc. – are the only requirements for a valid NOD. In sum § 7105 does

> not address directly the question under appellate review. In a general sense, the statute does not define an NOD. More important, on the *precise* question under review, the statute does not *directly* address whether an NOD is sufficient without a request for appellate review. Therefore, under the standard set by the Supreme Court, title 38 "contains a gap for an agency to fill" with regard to the definition of a legally valid NOD. *Chevron,* 467 U.S. at 843.

A6 (emphasis in original).

Section 20.201 does not add a "procedural" or "technical, formal requirement" to the statute, as the petition and the dissenting opinion assert. Pet. 3-4; A12. As the Panel decision recognizes, the procedural requirements for a valid NOD – that it must (1) be in a writing (2) filed with the agency of original jurisdiction (3) within one year from the mailed notice of the VA decision – are found in the statute itself. A6. The challenged provision concerns the content of a NOD, not procedural requirements.

This content requirement creates no barrier to appellate review. Section 7105 refers to a NOD only in the context of initiating an appeal to the board, and all that the regulation requires is a writing "which can be reasonably construed as disagreement with [a VA] determination and a desire for appellate review." It specifically states that "special wording is not required." There is nothing technical about section 20.201's requirements. It simply interprets one step in the appellate process specified by the statute.

The dissenting opinion incorrectly asserts that requiring an expression of a desire for appellate review in an NOD, which initiates the appeal process, is inconsistent

with section 7105, because a substantive appeal is the last step of a multi-step process of which the NOD is merely the first step and the substantive appeal is the last. A13-14. This argument misapprehends the role of the substantive appeal in the process of an appeal to the board, and ignores the substantial administrative burden that would be placed upon the VA by a rule requiring every post-decision communication from a claimant to be treated as initiating an appeal.

Section 7105 contains an elaborate appeal process that cannot and should not commence unless a claimant expresses a desire for appellate review. The VA is inundated on a daily basis by a myriad of correspondence from claimants and their representatives. *Gallegos v. Gober,* 14 Vet. App. 50, 59, 61 (2000) (dissent). Thus, there is a practical question of when correspondence, not labeled a NOD, but expressing some disagreement with a VA decision, should be treated as a request for appellate review. *Cf. Rodriguez v. West,* 189 F.3d 1351, 1354 (Fed. Cir. 1999) (recognizing practical considerations supporting VA regulation requiring claims to be in writing). Section 20.201 of the VA regulations addresses this practical question in an appropriate way.

CONCLUSION

For the foregoing reasons, appellee's petition for rehearing *en banc* should be denied.

Respectfully submitted,

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DAVID M. COHEN
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/s/ Todd M. Hughes
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I certify under penalty of perjury that on this 14th day of May, 2002, I caused to be placed in the United States mail (first-class, postage pre-paid) copies of "RESPONSE TO APPELLEE'S PETITION FOR REHEARING *EN BANC*" addressed as follows:

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Supreme Court, U.S.
FILED
NOV 4 2002
CLERK

No. 02-155

In the Supreme Court of the United States

RAYMOND GALLEGOS, PETITIONER

v.

ANTHONY J. PRINCIPI,
SECRETARY OF VETERANS AFFAIRS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Section 7105 of Title 38 provides that a claimant dissatisfied with a Department of Veterans Affairs benefits determination may initiate appellate review by filing a "notice of disagreement." The question presented is whether the court of appeals correctly held that 38 C.F.R. 20.201, which states that a notice of disagreement "must be in terms which can be reasonably construed as disagreement with that determination and a desire for appellate review," is a permissible construction of Section 7105.

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In the Supreme Court of the United States

No. 02-155

RAYMOND GALLEGOS, PETITIONER

v.

ANTHONY J. PRINCIPI,
SECRETARY OF VETERANS AFFAIRS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the Court of Appeals for the Federal Circuit (Pet. App. 1-22) is reported at 283 F.3d 1309. The opinion of the Court of Appeals for Veterans Claims (Pet. App. 24-49) is reported at 14 Vet. App. 50. The opinion of the Board of Veterans' Appeals is unreported.

JURISDICTION

The judgment of the court of appeals was filed on March 14, 2002. A petition for rehearing was denied on June 7, 2002. The petition for a writ of certiorari was filed on July 22, 2002. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In August 1993, petitioner filed a claim with the Department of Veterans Affairs (VA) for compensation

for post-traumatic stress disorder stemming from his military service. Pet. App. 25. The VA regional office denied that claim in September 1994. *Ibid.* On October 11, 1994, petitioner's representative, the Disabled American Veterans, submitted a letter to the VA entitled "Memo to Rating Board." The letter stated, in relevant part: "[I]t is our opinion that denial of the veteran's claim for [post-traumatic stress disorder] was a little bit premature. Further development * * * would prove beneficial to fair evaluation of this veteran's claim." *Id.* at 25-26.*

Petitioner took no further action until February 20, 1997, when he filed an application to reopen the disallowed claim. The regional office granted the requested benefits in October 1997, assigning an effective date of February 20, 1997. Pet. App. 26. Petitioner filed a notice of disagreement (NOD) challenging the effective date. *Ibid.* In petitioner's view, the benefits award should have taken effect on August 31, 1993, the date on which he filed his original claim. *Ibid.*

2. Petitioner appealed the regional office's decision to the Board of Veterans' Appeals (Board), which concluded that he was not entitled to an earlier effective date. Pet. App. 26. The Board reasoned that, while petitioner's October 1994 letter to the regional office could be understood as disagreeing with the denial of his original claim in September 1994, it could not "be reasonably construed to indicate the appellant's desire for appellate review." *Id.* at 27. Thus, the October 1994 letter did not constitute a valid NOD under 38 C.F.R. 20.201, which states that, "[w]hile special wording is not required, the Notice of Disagreement must be in terms

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* The record does not indicate what action, if any, the VA took in response to the letter. See Pet. App. 27.

which can be reasonably construed as disagreement with [the decision in question] and a desire for appellate review." *Ibid.* Since petitioner never filed an NOD challenging the September 1994 denial of his original claim, that denial had become final, and the earliest possible effective date for the benefits award was February 20, 1997—the date of petitioner's application to reopen the disallowed claim. See 38 U.S.C. 5110(a) (stating that "the effective date of an award based on * * * a claim reopened after final adjudication * * * shall not be earlier than the date of receipt of application therefor").

3. Petitioner appealed to the Court of Appeals for Veterans Claims (CAVC), which reversed the Board's decision and invalidated 38 C.F.R. 20.201 to the extent that it requires claimants to express a desire for appellate review when filing an NOD. Pet. App. 38-39. Under 38 U.S.C. 7105, the CAVC observed, an NOD must be (i) filed in writing, (ii) with the regional office, (iii) by the claimant or the claimant's authorized representative, (iv) within one year of the mailing of the regional office decision, and (v) must express disagreement with a specific determination by the regional office. Pet. App. 31. The CAVC determined that Section 7105 is clear and complete, leaving no "gap" for the VA to fill by regulation. *Id.* at 32, 35.

The CAVC found further support for that conclusion in the structure of Section 7105, under which an NOD serves only to "*initiate*[] appellate review." Pet. App. 32. By filing an NOD, a claimant signifies his desire for "review and development" by the regional office, *id.* at 34, which must issue a "statement of the case" explaining the reasons for its decision and the evidence and legal authority on which it relied, 38 U.S.C. 7105(d)(1)-(2). If the claimant still is dissatisfied after

receiving the statement of the case, "he or she *then* may pursue an appeal to the [Board] by filing a Substantive Appeal, and only then does the case go forward to the Board for its review." Pet. App. 34 (emphasis omitted). Thus, appellate review by the Board does not follow inevitably from the filing of an NOD, but occurs only if the claimant is unpersuaded by the statement of the case. The CAVC concluded that "it cannot be reasonable" for the VA to require claimants to express a desire for Board review at the time of filing an NOD when "it is quite possible that it may not become necessary to transmit the case to the [Board]." *Id.* at 34-35.

Finally, the CAVC emphasized that Congress deliberately designed the VA adjudication system "to be pro-claimant." Pet. App. 35. As such, any ambiguity in Section 7105 must be resolved in the veteran's favor. *Id.* at 36 (citing *Brown* v. *Gardner*, 513 U.S. 115, 118 (1994)). In light of the "remedial nature of the [Veterans Judicial Review Act] in providing judicial review to veterans and other VA claimants," *ibid.*, the CAVC could find "no basis for affording the [VA] even the slightest latitude to make it more difficult for a claimant to file an NOD," *id.* at 37. It reversed the Board's decision and remanded the matter for further adjudication as to the effective date of the October 1997 benefits award.

4. The Secretary of Veterans Affairs appealed to the United States Court of Appeals for the Federal Circuit, which again reversed. The court of appeals rejected the CAVC's conclusion that Section 7105 requires neither interpretation nor implementation by regulation. Pet. App. 7. It explained that, while the "statutory language supplies some requirements for a valid NOD," it does not "define 'notice of disagreement' or suggest sufficient expressions to make a writing an NOD."

Ibid. Nor does Section 7105 "suggest that its specifications for an NOD—writing, one-year time limit from notice, etc.—are the only requirements for a valid NOD." *Ibid.* "In sum," the court concluded, Section 7105 "does not *directly* address whether an NOD is sufficient without a request for appellate review. Therefore, under the standard set by the Supreme Court [in *Chevron U.S.A., Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 836 (1984)], title 38 contains 'a gap for an agency to fill' with regard to the definition of a legally valid NOD." *Ibid.* (quoting *Chevron*, 467 U.S. at 843).

Turning to the structure and purpose of the statute, the court of appeals concluded that the VA regulation "is a reasonable and permissible construction of § 7105." Pet. App. 8. It reasoned that the requirement that an NOD express a desire for appellate review "serves administrative efficiency by distinguishing a request for Board review from other routine communications in the wake of a VA decision." *Ibid.* Moreover, "meeting the requirement of [38 C.F.R.] § 20.201 is not an onerous task" for a claimant who wishes to pursue appellate relief. *Ibid.* The court rejected petitioner's claim that "a veteran cannot make an informed decision to appeal" prior to receiving a statement of the case from the regional office (which occurs only after a valid NOD is filed). *Id.* at 8-9. "To the contrary," it explained, "the VA decision [by the regional office] itself provides the veteran with information for an informed appeal decision," since the required notice of that decision "must include a statement of reasons for the decision and a summary of the evidence considered by the VA." *Id.* at 9 (citing 38 U.S.C. 5104(b)).

The court of appeals held that the CAVC "erred in not applying *Chevron* deference to the VA's imple-

mentation of 38 U.S.C. § 7105." Pet. App. 10. It reversed and remanded the CAVC's decision "for a determination as to whether [petitioner's October 1994] letter constitutes a valid NOD under [38 C.F.R.] 20.201." *Ibid.*

Judge Gajarsa dissented. Pet. App. 11-22. He concluded that "[t]he plain meaning and structure of § 7105 leave no room for an agency to add additional requirements to a NOD." *Id.* at 12. In Judge Gajarsa's view, therefore, "the inquiry does not pass step one of the *Chevron* test." *Ibid.*

ARGUMENT

The court of appeals' decision is correct and does not conflict with any decision of this Court or other courts of appeals. Accordingly, review by this Court is not warranted.

1. Petitioner contends (Pet. 6-12) that the court of appeals erred in according *Chevron* deference to the VA's interpretation of "notice of disagreement" because Section 7105 leaves no gap for the agency to fill. He does not deny that the VA has "authority to prescribe all rules and regulations which are necessary or appropriate to carry out the laws" it administers, 38 U.S.C. 501(a), or that such rulemaking authority extends to "the forms of application by claimants under [those] laws," 38 U.S.C. 501(a)(2), and "the manner and form of adjudications and awards," 38 U.S.C. 501(a)(4). Similarly, petitioner does not dispute that the VA's regulation must be analyzed under the principles set forth in *Chevron* and its progeny. Instead, he simply disagrees with how the court of appeals applied those settled legal principles to the particular regulation at issue. That claim does not warrant further review and, in any event, is without merit.

a. As the court of appeals explained (Pet. App. 7), Congress did not define the term "notice of disagreement" in Section 7105. Nor does that term have an obvious, common-sense meaning; to the contrary, it is a term of art peculiar to the field of veterans' benefits determinations. "[G]reat deference" is due an agency's interpretation of a term of art in its own area of expertise. *Ohio Power Co.* v. *FERC*, 744 F.2d 162, 167 n.4 (D.C. Cir. 1984) (noting "the great deference due the Federal Energy Regulatory Commission in identifying terms of art in the energy field"); *Illinois Terminal R.R.* v. *ICC*, 671 F.2d 1214, 1217 (8th Cir. 1982) (explaining that "'bridge toll' is a term of art in the railroad industry and, therefore, we give great deference to the ICC's interpretation").

Moreover, although Section 7105 specifies certain requirements for an NOD, nothing in the statute suggests that Congress intended that list of requirements to be exhaustive. As the court of appeals correctly concluded, Section 7105 is silent as to the "precise question at issue," *Chevron*, 467 U.S. at 843—whether an NOD should include an expression of desire for appellate review. Therefore, the operative question is "whether the agency's answer is based on a permissible construction of the statute." *Ibid.*

b. Petitioner maintains (Pet. 6, 8-10) that the structure of Section 7105 evinces a clear congressional intent to preclude any requirement that an NOD express a desire to seek appellate review. He emphasizes (Pet. 6) that an NOD is the first of a two-step process leading to review by the Board: The claimant first files an NOD with the regional office and then, after obtaining a "statement of the case," may file a "formal appeal" to the Board of Veterans' Appeals. 38 U.S.C. 7105(d). Since the immediate effect of an NOD is simply to

compel the regional office to issue a statement of the case, petitioner argues, "[i]t is clear * * * that Congress *only* asked that applicants express disagreement" in order to trigger that first step. Pet. 8.

That argument ignores Section 7105(a), which states explicitly that "[a]ppellate review will be initiated by a notice of disagreement." The fact that an NOD is not the last or only step in the appellate process is irrelevant. The key point—which petitioner does not dispute—is that an NOD is *a* part of that process. It is hardly unreasonable to require an applicant seeking to "initiate[]" "appellate review" to make that intention reasonably clear. 31 U.S.C. 7105(a). At the very least, nothing in the text of Section 7105 or the structure of the appellate review process suggests that Congress clearly intended to prohibit the VA from adopting such a rule. Therefore, the court of appeals was right to conclude that "*Chevron* deference applies to the VA's implementation of § 7105." Pet. App. 8.

2. The court of appeals also correctly concluded that the definition of "notice of disagreement" contained in 38 C.F.R. 20.201 is based on a permissible construction of Section 7105. Section 7105 is concerned entirely with administrative appeals to the Board. The term "notice of disagreement" is used "solely in the context of initiating an appeal to the Board. No other function of an NOD is mentioned." *Hamilton* v. *Brown*, 39 F.3d 1574, 1582 (Fed. Cir. 1994). And, as noted, Section 7105(a) states that appellate review of VA decisions is "initiated by a notice of disagreement." The VA's determination that an NOD should "be in terms which can reasonably be construed as * * * a desire for appellate review," 38 C.F.R. 20.201, is a consistent with those provisions.

a. Petitioner argues (Pet. 9-10) that it is "*patently unreasonable* and *manifestly contrary* to the statute to impose upon an appellant a requirement to express a 'desire for appellate review,' *before* an appellant has received a statement of [the] case" because, "more often than not," a claimant is not aware of the basis for the VA's denial of his claim until he receives the statement of the case. That is incorrect. In fact, Congress took pains to assure that veterans have sufficient information to make informed decisions with respect to appellate review before filing an NOD. As the court of appeals explained (Pet. App. 9), the VA is required by law to provide the claimant notice of any decision denying benefits. The claimant then has one year to file an NOD challenging that decision. 38 U.S.C. 7105(b). Under 38 U.S.C. 5104(b), the initial notice of decision must include a statement of the reasons for the VA's decision and a summary of the evidence it considered. Congress enacted Section 5104(b) to address concerns that, "'[l]acking such information, claimants for VA benefits very likely are impaired in making well-informed choices on whether to accept or appeal a VA decision.'" *Hayre* v. *West*, 188 F.3d 1327, 1334 (Fed. Cir. 1999) (quoting S. Rep. No. 126, 101st Cong., 1st Sess. 297 (1989)) (emphasis omitted). Of course, there would be no basis for such concerns if, as petitioner contends, Congress assumed that claimants would not decide whether to "appeal a VA decision" until after filing an NOD and receiving a statement of the case.

b. Petitioner also suggests (Pet. 7), again incorrectly, that 38 C.F.R. 20.201 changed the VA's prior interpretation of Section 7105. To the contrary, the VA regulations consistently have required that an NOD express a desire for appellate review. Congress created the appellate process articulated in Section 7105 in

1962. See generally Act of Sept. 19, 1962, Pub. L. No. 87-666, 76 Stat. 553 (enacting predecessor to Section 7105). The next year, the VA promulgated former 38 C.F.R. 19.1a(b), which stated that an NOD "should be in terms which can reasonably be construed as evidencing a desire for review of [the VA's] determination." 28 Fed. Reg. 35 (1963). Thus, for almost four decades, the VA has interpreted the term "notice of disagreement" to include some indication of a desire for review.

c. Finally, petitioner argues (Pet. 5) that the VA's definition of "notice of disagreement" creates an unnecessary barrier to appellate review and therefore contravenes the pro-claimant purpose of the statute. However, the regulation specifically states that "special wording is not required." 38 C.F.R. 20.201. It requires only that an NOD that serves to initiate the appellate review process contain language "which can be reasonably construed as * * * a desire for appellate review." *Ibid.* Moreover, the VA construes 38 C.F.R. 20.201 liberally in favor of triggering appeal rights. As it explained when the regulation was promulgated:

> VA has always been, and will continue to be, liberal in determining what constitutes a Notice of Disagreement. The continuation of this policy is demonstrated by the lack of a requirement for special wording and the use of the phrase "can be reasonably construed." Nevertheless, *some indication which reasonable persons can construe as disagreement with a determination by an agency of original jurisdiction and a desire to appeal that determination is at the very heart of what constitutes a Notice of Disagreement.* Without such an expression, the communication may be something, but it is not a Notice of Disagreement. *Not much is required, but*

the communication must be recognizable as a Notice of Disagreement.

57 Fed. Reg. 4093 (1992) (emphasis added).

Thus, the regulation does not impose any arbitrary or technical requirements on veterans. Nor is it inconsistent with the claimant-friendly system of veterans benefits adjudications. As an agency of original jurisdiction, the VA "receives innumerable communications from claimants and the claimants' representatives." Pet. App. 42. It needs some way to identify those communications that were meant to trigger the elaborate appeals process described in Section 7105. Accordingly, the VA's regulations consistently have provided that, in order to be treated as an NOD, a writing must contain some language that reasonably can be construed as an expression of desire for appellate review. That minimal requirement, grounded in the VA's practical experience with administering the benefits adjudication system, is consistent with a statutory scheme under which an NOD serves to "initiate[]" the appeals process. 38 U.S.C. 7105(a).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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